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Brief of Atty. Gen. (Gorman & Richards) for D. C

Filed Jan. 26, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, as County Commissioners of Muskingum County, Ohio, plaintiffs in error.
v.
THE UNITED STATES OF AMERICA, defendants in error.
} No. 209.

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BRIEF ON BEHALF OF THE UNITED STATES.

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STATEMENT.

This is a writ of error sued out from the circuit court of the United States for the southern district of Ohio, eastern division. The plaintiffs in error were prosecuted and convicted in the court below under a criminal information based upon sections 4 and 5 of the river and

harbor act approved September 19, 1890, which said sections are as follows, to wit:

That section nine of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

Section 5:

That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

"That if the persons, corporation, or association owning or controlling any railroad or other bridge

shall, after receiving notice to that effect as hereinbefore required from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars; and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed."

The cause was tried before a jury on the 11th of December, 1891, resulting in a verdict of guilty, the court reserving for consideration the question of constitutionality of the act until the argument of the motion for a new trial. Upon the argument of the motion for a new trial, the circuit judge (Judge Taft) and the district judge (Judge Sage) differed in opinion, and thereupon said difference of opinion was certified to the Supreme Court of the United States. At the October term, 1895, of this court the said certificate of division of opinion was dismissed, upon the ground that since the passage of the act of March 3, 1891, creating the circuit court of appeals, the Supreme Court had no longer jurisdiction of certificates of division of opinion in criminal causes. (163 U. S., 132.)

In June, 1897, a mandate of the Supreme Court was received and entered in the court below, and judgment rendered for the United States, and a fine imposed upon

the commissioners, the opinion of Judge Taft prevailing, he being the circuit judge.

In connection with the bill of exceptions it is to be observed that they were not signed until November 24, 1897, although the case was tried at the December term, 1891. The verdict was rendered at the December term, 1891, but the judgment was not rendered until the June term, 1897, and the record shows no continuance of the case for allowing or permitting a bill of exceptions to be filed after the trial term. Under such a condition of facts it is difficult to see what authority resided in the trial court to sign and certify a bill of exceptions five years after the return of the verdict, when the record shows no continuance of the cause for that purpose.

The bill of exceptions assigns numerous causes of error, all of which, however, are referable to two general propositions and are made to be embraced within the same by the counsel for the plaintiffs in error. The two general questions to be considered are:

First. Whether the powers granted to the Secretary of War by sections 4 and 5 of the river and harbor act of September 19, 1890, are to be considered as delegations of legislative power to that officer within the meaning of the inhibition expressed in the maxim *delegatus non potest delegare;* and

Second. Did the Secretary of War give to the plaintiffs in error reasonable notice and prescribe a reasonable time for the alteration which he required to be made, within the meaning of the term "reasonable" as used in the said river and harbor act?

Before proceeding to a discussion of these two questions, it is well to remark that although the Muskingum River is wholly within the confines of the State of Ohio, yet the same is under the exclusive management and control of the United States, and was so under the exclusive management and control before and at the time that these proceedings were had in the court below, said river, together with all of the improvements thereon, as constructed by the State of Ohio, having been ceded to the Federal Government by that State on May 2, 1885, and having been accepted by the United States under the river and harbor act of August 5, 1886 (see 24 Stat. L., 324; 25 Stat. L., 405), and since that time the complete control and management of said river has resided in the officers of the Federal Government.

BRIEF.

As preliminary to the discussion of the main question at issue, it is well to bear in mind the four following well-settled propositions:

First. The power of Congress over navigable streams is supreme and grows out of the power to regulate commerce, as conferred upon the Congress by the terms of the Constitution. (*Monongahela Navigation Company* v. *The United States*, 148 U. S., 335; *Bridge Company* v. *The United States*, 105 U. S., 475.)

Second. The Congress has plenary power to enact all laws which it shall deem necessary or proper for carrying into execution any power vested in it by the Constitution, and the degree of necessity which exists for the

passage of such a law can not be inquired into by the courts, but is within the exclusive province of the Congress. If the law passed by it be within the power granted, it is not within the province of the courts to say how reasonable, or how necessary, or how proper it was to pass such a law. (*McCullough* v. *Maryland*, 4 Wheat., 316–421; *The Legal Tender Cases*, 110 U. S., 421, 440, 441.)

Third. When the Congress chooses to act, it is not concluded by anything which has been previously done by its authority from assuming entire control of the matter and of abating any erections that have been previously made, or of forbidding others to be made in the future except they be made in conformity with such regulations as it sees fit to impose. (*State of Pa.* v. *The Wheeling Bridge Company*, 13 How., 518; *Gilman* v. *Philadelphia*, 3d Wall., 713; *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S., 1–12; *Monongahela Navigation Company* v. *The United States*, 148 U. S., 336.)

Fourth. That the Congress has the power to declare what is an obstruction to a navigable stream and to require the same to be removed, altered, or abated, is now too well settled to be questioned. (*Gilman* v. *Philadelphia*, 3 Wall., 713, v. *The Daniel Ball*, 10 Wall., 557, v. *Montello*, 20 Wall., 431; *Bridge Company* v. *The United States*, 105 U. S., 470; *Escanaba Company* v. *Chicago*, 107 U. S., 678; *Miller* v. *The Mayor of New York*, 109 U. S., 385; *Monongahela Navigation Company* v. *The United States*, 148 U. S., 336.)

I.

THE POWER INTRUSTED BY THE ACT OF SEPTEMBER 19, 1890, TO THE SECRETARY OF WAR IS NOT THE DELEGATION OF A LEGISLATIVE FUNCTION, BUT IS MERELY THE DELEGATION OF A POWER TO DETERMINE A FACT OR STATE OF THINGS UPON WHICH THE LAW MAKES OR INTENDS TO MAKE ITS OWN ACTION DEPEND. IT IS NOT, THEREFORE, OPEN TO THE OBJECTION THAT THE CONGRESS HAS DELEGATED TO ANOTHER A POWER WHICH COULD ONLY BE EXERCISED BY ITSELF, BUT IS MERELY THE SELECTION OF AN AGENCY TO CARRY OUT THE WILL OF THE CONGRESS, THE SELECTION OF SUCH AN AGENCY BEING RENDERED IMPERATIVELY NECESSARY BY THE INTERESTS AND MAGNITUDE OF THE POWERS INTRUSTED TO ITS CARE.

In the case of *United States* v. *Keokuk and H. Bridge Company* (45 Fed. Rep., 178), it was held by Judge Shiras that a bridge having been built and maintained in accordance with the requirements of an act of Congress, the Secretary of War can not declare it an obstruction to navigation and require it to be changed, remodeled, or rebuilt under the act of Congress of August 11, 1888 (25 Stat. L., 424, sections 9 and 10), and the opinion is expressed that the power delegated by that act to the Secretary of War was an improper delegation of legislative authority, and this case was followed and to some extent amplified by Judge Sage in the case of *The United States* v. *Rider* (50 Fed. Rep., 410).

Since these decisions the act of 1888 has been amended by sections 4 and 5 of the act of 1890 previously quoted in this brief. Among other material changes made by the amendments it is provided that the obstruction must be unreasonable, and that the parties shall have a reasonable opportunity to be heard, and that the Secretary of War shall specify the change to be made. Section 5 expressly makes a failure to comply with the requirements of section 4 a misdemeanor.

Since the passage of these amendments the act has been before the district court for the northern district of Illinois for construction in the case of *The United States* v. *The City of Moline* (82 Fed. Rep., 593), in which the contentions which are raised here were made, and in which the decisions in the Rider Case and in the Keokuk Bridge Case, above referred to, were fully considered. It was held, however, that section 4 of this act of September 19, 1890, authorizing the Secretary of War to give notice for the alteration of bridges that he believes to be unreasonable obstructions to navigation, and empowering the district attorney to prosecute parties refusing to comply with such notice, is not unconstitutional, as vesting in the Secretary of War either judicial or legislative power, and in rendering the decision Judge Grosscup said:

> The bridge during the time of its present construction is an effectual obstruction to such waterway. If Congress can, by special act, constitutionally endow the arm of the Secretary of War with the power to remove everything that lies in or across that river obstructive to the proposed waterway,

why may it not grant such power, with equal efficacy, by a general act applying to all cases as they arise? Whether the act conferring the power be special or general, the War Department becomes simply the arm that carries out the legislative will. It is true that this involves decision of the Department, but the Department can in no instance be an effective and at the same time an insensate and unjudging executive instrument. In administrative undertakings of this character the directions can not be so completely foredrawn by Congress that there will be left no questions to the administrative mind to decide. The test of the legality of the delegation of the power is, not that the administrator must himself decide questions as they arise, but, are the questions thus presented essentially judicial?

In this case two questions alone arise: First. Is the bridge an obstruction to navigation? Second. Is it there by any such legal right that the Government may not interfere with it in the respect designated without just compensation? The first question is purely administrative, and is one that Congress can certainly delegate to the Secretary of War. A thousand questions of equal moment to the parties interested, and of equal difficulty, are necessarily delegated to the great departments of the Government every month. In the very nature of things, Congress can not dispose of them. A government of the size of this, operated upon such a conception, would be clogged immediately.

The second question is, undoubtedly, judicial, and for that very reason is not subject, constitutionally, to the decision of Congress any more than of the Secretary of War. If the bridge be there by legal right—if it be a franchise or property that can not be taken except after just compensation—Congress

is powerless, either by special or general acts, to touch it. In the face of such property right, Congress is as helpless as the War Department. In the end, such right, whether it be attacked by special act of Congress, or by some action of the War Department, will, through some channel, find an appeal to the judiciary.

This right of appeal to the judiciary in all questions in their nature judicial is preserved in the sections of the statute under discussion. The Secretary of War has no power to carry out his decisions respecting these obstructions except through a court. Any question, whether of law or fact, essentially judicial, may be raised under these informations. A court of the United States stands always, by the clear provisions of the act, between the decision of the Secretary and its execution. There is, therefore, in the act no delegation of judicial power to the Secretary that is not open to review in the courts. I hold, therefore, that the act, so far as it is applicable to the case in hand, is constitutional and valid, and the motion to quash will be overruled.

The provisions of sections 4 and 5 of this act of September 19, 1890, were also before this court in the case of *Lake Shore and Michigan Southern Railway Company* v. *Ohio* (165 U. S., 365), and while the question of the delegation of legislative power to the Secretary of War was not passed upon in that case, yet the act was upheld by the court, the court holding that this act, which confers upon the Secretary of War authority concerning bridges over navigable waterways, does not deprive the States of authority to bridge such streams, but simply creates an additional cumulative remedy to prevent such structures, although lawfully authorized, from interfering

with commerce, and the inevitable inference to be drawn from the decision is that the authority given by said act to the Secretary of War to require the change or removal of such bridge, when in his opinion the same is an obstruction to commerce, is an authority which may be constitutionally delegated by the Congress to the Secretary of War.

A decision similar to the Moline Case was rendered in the case of *The United States* v. *Ormsby* (74 Fed. Rep., 207), under the act of August 17, 1894, whereby the Congress empowered the Secretary of War to prescribe such rules and regulations for the use, administration, and navigation of canals, etc., under the control of or operated by the United States as in his judgment public necessity might require; and it was held that such an authorization was not invalid as a delegation of legislative power, and that the rules made by the Secretary pursuant to said law had the force and effect of law, so that persons violating the same by drawing off water from the canal are subject to criminal punishment under the provisions of said act. In that case Judge Seaman, while, of course, admitting the general rule that delegated power can not be redelegated, says:

> This rule, however, applies only to powers which are strictly and exclusively legislative, and there is a wide range of subjects which may be regulated by direct legislation, but for which general provision may be made and power given to those who are to act under such general provisions to fill up the details, for, as remarked by Chief Justice Marshall, "Congress may certainly delegate to others powers

which the Legislature may rightfully exercise itself." (*Wayman* v. *Southard*, 10 Wheat., 1–43.)

* * * * *

The legislature can not delegate its power to make the law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.

As an example of this see the case of *The Aurora* v. *The United States* (7 Cranch, 382). This case grew out of the violation of the nonintercourse act passed by the Congress during the period preceding the war of 1812. This was a law which was to be enforced against Great Britain and France until those countries should modify their policy toward the United States, when the President was authorized to raise the embargo by executive proclamation. Here, of course, was a law which depended entirely for its repeal upon the happening of a contingency, the sole determination of which was left to the Executive.

The right of the Congress, however, to pass such a law was upheld by this court, because the delegation of authority was not a delegation of authority to make the law, but only to enforce it or to repeal it upon the happening of a contingent event, which, in the very nature of things, could not be determined by the Congress. This case which was decided in 1813, and reaffirmed by this court in 1891, in *Field* v. *Clark* (143 U. S., at p. 683), may almost be said to have initiated the doctrine in this country that the legislature may pass a law to take effect upon the happening of a future contingency, and may leave the determination of the happening of that

contingency to an agent selected for that purpose, whether such agent be an executive officer or a municipal corporation, or the people themselves. It has been quoted and followed in hundreds of State decisions, and the principle involved in it invoked to sustain those laws where municipal corporations are authorized to purchase bonds, erect improvements and the like, laws referring the question of the sale of ardent spirits to the people of a county, municipality, or district, and other laws of kindred character.

Though these laws were originally attacked as unconstitutional delegations of legislative functions, and though they have by some courts been for this reason declared unconstitutional, yet the overwhelming weight of authority is in favor of their constitutionality, and the tendency of all the modern decisions, even in those States where they were once denounced, is to sustain them. (See Oberholtzer on The Referendum in America, c. 5, where the decisions of the State courts on this subject are given in chronological order.)

The doctrine which inhibits the redelegation of a delegated power is a limitation placed upon the principle that whomsoever does a thing through another shall be considered as having done the thing himself. It has to do, primarily, with the law of individual agency, and the maxim is sometimes expressed *vicarius non habet vicarium*. (Broome's Leg. Max., 839.)

The doctrine, however, so far as it be applied to the exercise of legislative functions strictly by the legislative body, is true only in a qualified sense and is not to be taken in the strict application that is given to it when

applied to the law of agency as affecting individuals; and the qualifications of this doctrine as applied to the exercise of governmental functions are becoming larger and larger every day and must of necessity become larger as the demands of civilization increase. There is noticeable in all of the modern decisions a tendency in the direction of assigning duties hitherto deemed legislative to other bodies—to boards and commissions, to local authorities, to executive officers, to agents, and particularly to the votes of the people themselves.

The plan of delegating powers which, in the strict sense of the term, may be regarded as legislative, to the people themselves, is growing in favor in every representative form of government, and is the gradual adoption of the system known as referendum; and although the adoption of this name is of recent origin, its principle is as old as the United States themselves, experiments in it having been made in Rhode Island during colonial times. (See Oberholtzer, the Referendum in America (1893, c. 5), where the treatment awarded this class of legislation by the courts is traced in historical order; see Providence Book of Notes, May 5, 1894.) This tendency has manifested itself in a variety of forms. For example, in referring matters of local interest and administration to the electors of the locality interested; in enlarging the scope of State constitutions by adding multitudinous administrative provisions, all of them being submitted to voters; in the submission of questions concerning local option to the vote of the localities interested, and in many familiar statutes of this character.

So examples may be drawn from the provisions of general laws providing for the organization of corporations, conferring upon them powers of eminent domain which operate only when an association of individuals apply for charters under them, thus giving to those voluntary associations the power of saying when and where the great prerogative of eminent domain shall be directed against the property of citizens; the right to refer the adoption or rejection of the terms and conditions of a charter or a question whether a county or township shall be divided or a new one formed, or the question whether a general school law shall be accepted in a particular locality, or whether subscriptions to works of internal improvement shall be made to the decision of the people affected by it; the conditions prescribed by general laws for the organization of municipal corporations, with power to tax and to grant exclusive franchises, which lie dormant until invoked and effectively directed upon particular localities by the voluntary action of a specific number of voters or property holders; provisions of similar character to this last named which are made for the purpose of adding new territory to municipal corporations, etc.

All laws of this character have been contested from time to time upon the ground that they were a delegation of legislative authority, and in the strict and technical use of that term, perhaps they are, but in the practical administration of the affairs of a great government, it has been found to be a physical impossibility to apply a narrow construction of the maxim *delegatus non*

potest delegare, and a departure from the strict construction of that maxim, which has obtained in the administration of private affairs, is rendered absolutely necessary by the conditions and the necessities which concern the legislature in the passage of laws for the government and well being of society.

Certain things have been held to be consistent with the rule that power can not be delegated, which perhaps in their ultimate analysis may be found to be in fact a delegation of authority rendered necessary in the practical administration of affairs. It is immaterial what nomenclature be used, whether the result brought about would be a modification of the maxim that power lodged in one department of the Government can not be delegated, or whether it be a refinement upon the facts as to whether or not there has been a real delegation, the practical solution of the problem is the same, and it has always been reached by a wise judiciary, whether the one reason be assigned or the other.

In the question as presented to the court in this case, we have a law whereby the Congress has passed a complete act providing that it shall be a misdemeanor to maintain an unreasonable obstruction to navigation after a notice and hearing and after the special tribunal charged with the investigation and finding of the fact has determined that there is an unreasonable obstruction and a reasonable time for removing the obstruction has expired. The party concerned has a hearing, and the offense is not complete until after the hearing and a determination against him and the opportunity to abate the obstruction has been given.

Now, the whole inquiry resolves itself into this: Must the Congress itself consider every case of alleged obstruction to navigation and determine the facts and declare that an obstruction exists, or can it generally define the offense and leave the facts to be determined by a court or a special tribunal? Because the Congress is vested with the power to protect navigation, and can, therefore, remove an obstruction, it does not follow that it must examine into the details and facts of each case.

It would be impracticable, it would be impossible, and to hold that the Congress itself must determine all of the facts in every given case and perform the functions which, under the act of September 19, 1890, it has authorized the Secretary of War to do will practically result in a complete nullification of the power of the Congress to do anything at all. For example, the present Congress will adjourn on the 4th of March and will not reassemble until the following December. Suppose that on the 5th of March there is built across the Mississippi River a bridge which completely obstructs the navigation of that stream. Is the commerce of all the middle West to remain suspended from March until December because, forsooth, during that time there is no Congress in session to abate the obstruction? Practically, therefore, the argument reduces itself to an absurdity if we are to have any regard for the practical administration of the affairs of a great Government like this.

And so there can be no objection to the Congress permitting the Secretary of War to pass upon the

question of the reasonableness of such an obstruction. What is or is not reasonable must of necessity be a question of fact, wholly dependent upon the peculiar circumstances of each particular case. It can not possibly be measured by a tape line, and it would be as silly for the Congress to pass a law undertaking to define the term "reasonable" as it would be to pass a law for the definition of the word "fraud," and to fix its limitations and its characteristics. If this power is to be exercised at all, it must be under a general law, declaring, as the law under discussion does, that the maintenance of an unreasonable obstruction shall be a misdemeanor and the determination of the facts must be left to some tribunal, either a regular court or else a commission, or else an executive officer.

The determination of such a question in the regular courts by judicial proceedings would be tedious and expensive, and the results would be varied, inasmuch as different juries would arrive at different conclusions upon almost the same state of facts. In the interest of economy, promptness, and uniformity of decision, it is manifest that the best course to be adopted is the one that has been prescribed in the act of 1890. But if it may be regarded as more advantageous to secure the determination of a court upon these issues, then we submit that this result is also accomplished by the act of 1890, inasmuch as there can be no conviction for the offense here denounced except after a trial thereof upon regular information before the United States courts, so that ultimately every possible question arising under this act

may be thus presented to the regular judicial officers of the Government for determination.

The act, therefore, in question can not be made subject to this criticism. But even if it should be considered that the action of the Secretary of War was final, still it is entirely competent for the legislature to establish, independent of the courts, special tribunals, whose judgment shall be final. The taxing interests of this country involve by far the largest question so far as value is concerned. The assessment of property is necessarily intrusted to special tribunals, which operate constantly upon a vast scale; they are composed of non-judicial officers, and if they pursue the law, their conclusions are final; and so it is held that the Congress may intrust to executive officers the final determination of facts upon which foreigners may be sent out or excluded from this country, and their conclusions can not be reexamined by the courts. (*Nishimura Ekiu* v. *The United States*, 142 U. S., 651; *Fong Yue Ting* v. *The United States*, 149 U. S., 698; *Lem Moon Sing*, 158 U. S., 538.)

Congress has repeatedly passed laws committing the execution of acts in regard to the admission of aliens into the United States to the Secretary of the Treasury, collectors of customs, and to inspectors acting under their authority. (See acts of Mar. 3, 1875, c. 141, 18 Stat., 477; Aug. 3, 1882, c. 376, 22 Stat., 214; Feb. 23, 1887, c. 220, 24 Stat., 414; Oct. 19, 1888, c. 1210, 25 Stat., 566.)

By section 3 (22 Stat., 214), and in similar laws, the Secretary of the Treasury was authorized to establish rules and regulations and to issue instructions to carry

out these and other immigration laws of the United States.

In *Enterprise Saving Association* v. *Zumstein* (67 F. R., 1000) it was held by the circuit court of appeals of the sixth circuit, in an opinion delivered by Judge Lurton and concurred in by Judges Taft and Severans, that in enforcing the postal laws against lotteries it was competent for Congress to intrust to the head of the Post-Office Department the determination of the question as to what was a lottery.

Congress can only legislate in a general way, and large powers are necessarily intrusted to the different departments, such, for instance, as the supervising power given to the Secretary of the Interior over questions of patents and in relation to Indians and the public lands. It has been held that he can set aside a survey and order another survey and issue a patent thereon, which is the exercise of judicial power. This right arises from the supervising power given him under the statute, and the courts have invariably sustained it, and in speaking of this class of powers have said:

> It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise and therefore that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice. (*Williams* v. *United States*, 138 U.S., 524; *Knight* v. *United States Land Association*, 142 U.S., 181.)

In *McCulloch* v. *Maryland* (4 Wheat., 316, 421) Chief Justice Marshall said:

> The sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and the spirit of the Constitution, are constitutional.

It has now been established beyond controversy that Congress has the power to incorporate national banks and clothe them with large discretionary powers and for the purpose of accomplishing what Congress itself might directly do.

This power was maintained in *McCulloch* v. *Maryland* (4 Wheat., 316) and in *Osborn* v. *United States Bank* (9 Wheat., 738) mainly upon the ground that it was an appropriate means for carrying on the money transactions of the Government. (*Legal Tender Case*, 110 U. S., 445.)

Congress may, directly or *through corporations* created for that purpose, construct bridges or railroads for the accommodation of interstate commerce. (*California* v. *Central Pac. R. R.*, 127 U. S., 1; *Luxton* v. *River Bridge Co.*, 153 U. S., 525.)

In re *The Laura* (114 U. S., 411), although the pardoning power is, by the Constitution, vested in the Presi-

dent, the court held that an act authorizing the Secretary of the Treasury to remit fines and penalties incurred by a steam vessel was valid, and it held that to determine otherwise would be to overthrow the practice which had been observed and acquiesced in for nearly a century.

In *Dorsheimer* v. *United States* (7 Wall., 166) it was held that such power intrusted to the Secretary of the Treasury is one for the exercise of his discretion in a matter intrusted to him alone, and that it admits of no appeal to any court.

In all those cases in which it is held that executive officers of the Government will not be controlled by the court in matters in which they have to exercise judgment or discretion, it is apparent that large powers are intrusted by Congress under the acts investing them with authority, and that they really exercise in this way, by delegation, and necessarily so, for the purpose of carrying on the vast affairs of the Government and its details, authority which in a strict sense pertains to Congress. (See *Decatur* v. *Paulding*, 14 Pet., 497-514; *United States* v. *Guthrie*, 17 How., 284; *United States* v. *The Commissioners*, 5 Wall., 563; *Litchfield* v. *Register and Receiver*, 9 Wall., 575-577; *Cornick* v. *Lamar*, 116 U. S., 426.)

In *United States* v. *Breen* (40 Fed. Rep., 402) it was held that Congress can authorize the Secretary of War to make rules and regulations, and can make it a misdemeanor to violate these rules when so made.

In *United States* v. *Bailey* (9 Pet., 238) it was held that the crime of perjury, which was defined by statute, could be committed by taking an oath in conformity with a mere regulation of the Treasury Department.

In *Caha* v. *United States* (152 U. S., 219), in commenting upon this decision, the court said:

> It was held that the Secretary had power to establish the regulation, and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this notwithstanding the fact that such justice of the peace was not an officer of the United States.

In the Caha Case the court upheld an indictment for perjury which grew out of proceedings instituted in accordance with regulations of the Interior Department.

These cases and the case under consideration differ from that of *United States* v. *Eaton* (144 U. S., 677), in which the court held that a failure to comply with regulations made by the Commissioner of Internal Revenue could not be punished. The reason was that the statute had not made such refusal an offense.

The court said:

> It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns, as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890.
>
> Regulations prescribed by the President and by the heads of Departments, under authority granted by Congress, may be regulations prescribed by law,

> so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen where a statute does not distinctly make the neglect in question a criminal offense (p. 688).

The case under discussion has the element which was lacking in the Eaton Case, for the statute has distinctly made the neglect in question a misdemeanor.

The act of July 5, 1884, section 3, makes the Commissioner of Navigation's finding conclusive on all questions of interpretation growing out of the execution of the laws relating to the collection of tonnage tax. (*N. G. L. S. S. Co.* v. *Hedden*, 43 F. R., 17–25.)

Among the powers conferred upon Congress by the eighth section of the first article of the Constitution are the following:

> To provide and maintain a navy.
>
> To make rules for the government and regulation of the land and naval forces.

It was held in *Dynes* v. *Hoover* (18 How., 20), and the decision has never been questioned, that under this provision of the Constitution Congress has the authority to establish courts-martial.

It was further held that the decision of the court-martial in a matter where it has jurisdiction is final and can not be reviewed by the courts. (20 How., 83; *Johnson* v. *Sayre*, 158 U. S., 109.)

Congress, in establishing courts-martial, provided that the Secretary of the Navy is authorized to establish

"regulations of the Navy," with the approval of the President. (12 Stat., 565; Rev. Stat., sec. 1547.)

Pursuant to this authority, "regulations for the administration of law and justice" were issued on the 15th of April, 1870.

It has been held that such regulations have the force of law. (*Gratiot* v. *United States*, 4 How., 80; Ex parte Reed, 100 U. S., 22.)

Thus the legislative power is not exercised in detail, but a court is established in pursuance of the power conferred upon Congress, and the Secretary of the Navy is clothed with the power of making regulations to control the court.

This is one of the many instances in which it is essential for the operations of a great Government that matters of detail be intrusted by the legislative department to executive officers for the purpose of giving effect to legislative acts.

By article 34, Revised Statutes, section 1624, the proceedings of summary courts-martial are to be conducted under such forms and rules as may be prescribed by the Secretary of the Navy, with the approval of the President.

Here Congress has constituted a court and it has delegated to an executive officer authority to establish rules for its procedure.

By section 1547, Revised Statutes, the regulations issued by the Secretary of the Navy, and as they might thereafter be altered by him, with the approval of the President, are recognized as the regulations of the Navy.

In pursuance of these regulations Sayre became "a person in the naval service of the United States." He was tried by a court-martial, and the Supreme Court refused to review its findings. (*Johnson* v. *Sayre*, 158 U. S., 117.)

By an act of June 23, 1874 (18 Stat. L., 237, 240), an appropriation was made, to be expended under the direction of the Secretary of War, for the repairs, preservation, and completion of certain public works and, *inter alia*, "for the improvement of the harbor of Savannah."

A like appropriation was made by the act of March 3, 1875 (18 Stat., 459), "for the improvement of the harbor of Savannah, Ga."

Neither of these acts directed the manner in which these appropriations should be expended. The mode of improving the harbor was left to the discretion of the Secretary of War.

The legislative department declared that the improvement should be made, and devolved the determination of what would or would not be an improvement upon the Secretary of War.

It was contended that while Congress had the power to authorize the construction of a specific work it could not invest the Secretary of War with such large discretion, and that for this reason the act was void. The Supreme Court sustained the act in *South Carolina* v. *Georgia* (93 U. S., 13).

In that case, acting under the commerce clause, Congress authorized an improvement. It empowered the Secretary of War to determine what would or would not be an improvement, and so the act could not be made

effective without the action of the Secretary of War. If he determined the character of the improvement that was final, and the act operated upon it.

In the case at bar Congress makes the obstruction to navigation a misdemeanor. It devolves upon the Secretary of War to determine when there is an obstruction and to give the party a hearing upon the investigation. When this special tribunal has determined that there is an obstruction, then the act operates upon it as in the former case.

In *Miller* v. *Mayor of New York* (109 U. S., 385, 393, 395) it appeared that Congress authorized the building of a bridge over a river, but the particular bridge authorized was such as should thereafter be approved by the Secretary of War. After the Secretary of War fixed, by his approval, the character of the bridge, which was not an obstruction to navigation, then the act operated upon it and authorized the building of the bridge. Until then the legislative license did not go into effect. Here was a complete act in the abstract, but its operation in the concrete was dependent upon the determination of facts by the special tribunal. It was contended that this was an unlawful delegation of the power vested in Congress. The court held to the contrary, saying:

> By submitting the matter to the Secretary Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that upon a certain fact being established the bridge should be deemed a lawful structure, and employed the Secretary of War as

an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with.

The act in question, in requiring the approval of the Secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment or particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. (*South Carolina* v. *Georgia*, 93 U. S., 13.)

By section 2380, Revised Statutes—

The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population.

Following strict construction, this would be a delegation by Congress of its legislative power.

In *Currier* v. *West Side Elevated Patent Ry. Co.* (6 Blatch., 487) it was held that authority conferred upon commissioners to approve an experimental elevated railroad, and making such approval essential to the continuance in existence of the railroad, was not a delegation of legislative power.

The creation of a railroad commission to fix reasonable tolls for freight and passenger transportation is not an unconstitutional delegation of legislative powers. (*Georgia* v. *Smith*, 70 Ga., 694.)

Neither is giving power to the governor to make pilotage regulations. (*Martin* v. *Witherspoon*, 135 Mass., 175.)

The statute providing for the civil service authorizes the Commissioners and the President to make rules for carrying the act into effect, and the President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof. (22 Stat., 403; sec. 1753, Rev. Stat.)

Under the *Act of February 8, 1887* (24 Stat., 388), power is conferred upon the President, when he shall have determined certain facts, to allot land in severalty to Indians on reservations.

In *Field* v. *Clark* (143 U. S., 649) it was held that Congress might confer authority upon the President to suspend by proclamation the operation of the law affecting the importation of certain articles upon his determination that any country producing such articles imposed duties upon the agricultural or other products

of the United States which in his opinion were reciprocally unequal or unresonable.

The court said:

> Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of the law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. (Opinion, p. 693.)

The field of such discretionary powers is too vast and too familiar to need references for illustration. It requires but the slightest acquaintance with the great body of the laws to understand that powers of the most important character are constantly entrusted by the legislature to the judgment of other departments, individuals, or corporate bodies in relation to matters which the legislature undoubtedly might, if it saw fit, regulate or determine by the direct exercise of its own judgment. The power given to the judicial department to adopt rules of practice having the force of laws; the power given to the President to prescribe rules and regulations for the drafting of soldiers in time of war, are familiar illustrations, and it by no means follows that because the legislature *may* regulate a matter directly that it therefore *must* do so.

One of the earliest illustrations of the exercise of the principles of the referendum by the Congress occurred in the year 1846, when the Congress submitted to the people of the county of Alexandria the question of retrocession, and the popular assent having been given, the

county was reattached to the State of Virginia. (See 9 Stat., p. 35, and proclamation of President Polk, p. 1000.) This act of July 9, 1846 (9 Stat. L., 35), has been much cited by the courts as tending to show the constitutionality of lawmaking by vote of the people in the States, inasmuch as the method had been employed by the Federal Government.

It is not essential to the character and force of law that the legislative enactment should itself command to be done everything which is provided for in the act. The legislative power to command a particular thing to be done includes the power to authorize it to be done. The act under authority conferred by the legislature is precisely as legal and valid as if done in obedience to a legislative command. Each is entitled to the same force and efficacy, and each must be followed by all the consequences which, either by the general law or by the particular statute, are annexed to the particular act, because each is done in effectuation of the legislative will, and each when done according to that will has all the sanction which the legislative power can give. Each is therefore entitled to the aid of the whole power of the Government to uphold it and to maintain the rights which flow from it. The peremptory statute is at once mandatory and requires obedience, and thus is at once a perfect law in all respects. A statute giving authority to do or not to do and prescribing the consequences of the act when done has not, until the act is done, any mandatory effect requiring immediate obedience, except so far as it regulates the time and manner of doing the act and expressly or impliedly commands that the agent

shall not be prevented from doing it according to the discretion allowed. Beyond that it has not a mandatory effect until the act is done, and it is not till then a perfect law as to all the purposes provided for. In other words, it does not take its final effect as a mandatory law until the discretionary act is done upon which it is to have its final and peremptory operation. So far as the statute confers authority and discretion it is as obligatory from the first as the legislative power can possibly make it. And although its further practical efficacy may depend upon the discretionary act of some other body or individual, it is not derived from that discretion, but from the will of the legislature which authorized the act and prescribed its consequences.

Half the laws on our statute books are enacted in the alternative, depending upon the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them; but it is uniformly held that the exercise of such discretion is in no sense to be regarded as the making of the law. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done, but to the latter there can be urged no valid objection.

In re Richard Oliver, 17th Wis., 681;
Slack v. *The Railroad Co.*, 13 B. Mon.;
Railroad Company v. *The Commissioners of Clinton County*, 1 Ohio State, 88;
Locke's Appeal, 72 Pa. State, 491.

It is therefore submitted that the act under consideration does not delegate to the Secretary of War any legislative or judicial function, but, on the contrary, merely creates that officer the agent to carry out the legislative will in removing or abating obstructions upon navigable streams; and that the act, upon the authority of the decisions of this court referred to, is in all respects a lawful and proper exercise of the legislative function, and as such should be upheld by the judiciary.

II.

THE TIME GRANTED BY THE ORDER OF THE SECRETARY OF WAR WITHIN WHICH THE REQUIRED ALTERATIONS SHOULD BE MADE WAS A REASONABLE TIME WITHIN WHICH TO ACCOMPLISH THE SAME, BOTH IN FACT AND IN LAW.

The second point covered by the various assignments of error is that the time within which the designated alterations in the bridge were required to be made was unreasonable in this, to wit, that, although the notice to make said improvements was given on February 21, 1891, and the improvements required to be made on or before September 20, 1891, a period of seven months, and it is not pretended that the improvements could not have been made within that time, yet there were no funds available for this purpose in the hands of the county commissioners during the said period; that they could not, under the laws of the State of Ohio, levy any special tax for this purpose which

would have become available within the prescribed period, and that they failed to obtain from the legislature a special appropriation for such purpose, and hence the order practically required the accomplishment of an impossibility because of this absence of funds.

When we come to examine all the facts connected with this transaction, however, it will be readily seen from the evidence disclosed in the record that this plea of unreasonableness of time was a mere afterthought on the part of the plaintiffs in error, urged for the first time upon the trial of the cause in the court below, never relied upon or suggested as an excuse for their failure to comply with the orders of the Secretary of War, and that the assignment of it as an error is a mere technical pretense to escape the consequences of their deliberate refusal to comply with the orders of the Secretary of War, which said refusal was based, not upon any lack of funds to carry out the provisions of the order, but upon their denial of the authority of the Secretary of War to give such notice or to require them to make such alterations in the bridge.

On pages 35–50 of the transcript there is set up, as Exhibit A to the testimony, all of the correspondence had between the Secretary of War, the engineer officers of the Government directly in charge of this work, and the county commissioners of Muskingum County, which said correspondence embraced in said Exhibit A is introduced in evidence by consent of the parties. (See transcript, p. 10, folio 13.)

From this correspondence it will be observed that although the actual notice from the Secretary of War, as

contained on page 48 of the transcript, was not issued until February 25, 1891, yet the matter was first discussed between Col. William E. Merrill and the commissioners of Muskingum County by the former's letter of December 19, 1890, in which said commissioners are informed that said bridge between Taylersville and Duncans Falls had been reported by him to the Secretary of War as an obstruction to navigation, with the object of requiring an alteration in said bridge under the provisions of sections 4 and 5 of the act of September 19, 1890, and advising said commissioners that full opportunity would be given to them to meet such complaint and to submit such statements, propositions, and evidence in reply to said complaint or bearing on the subject as said commissioners should deem pertinent, and for that purpose Colonel Merrill designated the United States engineer's office at Zanesville, Ohio, at 10 a. m. on the 6th of January, 1890, as the time and place at which such defense might be made by said commissioners.

The first reply to the complaint that this bridge was an obstruction to navigation is contained in the letter from the county commissioners of Muskingum County to the Secretary of War, dated Zanesville, Ohio, February 3, 1891 (Record, pp. 36, 37), in which said letter the Secretary is informed by said commissioners that they deny the authority of the United States to require this alteration in the bridge, unless done at the expense of the Federal Government, inasmuch as said bridge had been built and was in operation at the time the Government accepted the improvements of the Muskingum River from the State of Ohio, and was at that

time a lawful structure, erected under and by virtue of authority from the general assembly of Ohio.

It will be noted that there is no suggestion here of a lack of funds in the county treasury with which said alterations can be made, but a mere denial of the legal right of the Secretary of War to require the same to be done by the county. Long prior to this time, to wit, on October 28, 1889, the commissioners of said county had been informed that said bridge was an obstruction to navigation, and that it would be necessary to place a draw in said bridge to remedy this defect, and Lieutenant Gillette, in this letter, is directed to see the commissioners personally and find out their views in the matter, and Colonel Merrill informs Lieutenant Gillette that if they will place the draw in the bridge by the following summer he will take no official steps in this matter, but that it is necessary to have the decision of the commissioners on this subject before long, inasmuch as this obstruction to navigation can not be permitted to remain indefinitely. (See letter of Merrill to Gillette, transcript, bottom of page 39.)

On January 6, 1890, Lieutenant Gillette writes to Colonel Merrill (record, p. 40,) as follows:

> Referring to the matter of the draw in the Taylorsville bridge below New Lock No. 9, the county commissioners, without expressing an opinion as to the legal merits of the case, decline to make the alterations in the Taylorsville bridge unless they are compelled to do so. They give as a reason for this that they wish to protect themselves against criticism from the taxpayers. If ordered to alter the

bridge they propose to employ legal talent toward resisting it.

Here again, we observe that there is no pretense of a lack of funds with which to accomplish the required changes, but merely a desire to protect themselves from the wrath of the taxpayers.

On January 22, 1890 (record, pp. 40, 41), Colonel Merrill again addressed a communication to the commissioners of Muskingum County, calling their attention to this matter and again informing them that they would have opportunity on February 4, at 12 m., at the office of the United States engineer at Zanesville, Ohio, to make such verbal or written defense as they desired to offer. This latter was answered January 24, 1890, by J. A. Knight, informing Lieutenant Gillette that the commissioners would appear before him on the day named, to wit, February 4, 1890 (transcript, p. 41), and on that day the following defense, as it appears on page 42 of the transcript, was presented by said commissioners at said hearing:

> Replying to yours of the 22d ultimo, would state that the undersigned commissioners decline to take any steps toward placing a draw in the bridge, on the grounds that the bridge was built under proper authority and was not an obstruction to navigation, as the same was provided for by a draw span over the canal. The abandonment of the canal and requirement of a channel through what is now a continuous span was the act of the United States authorities, and said commissioners insist that the Government should bear the expense of making the change in the bridge.

This letter is signed by the commissioners of Muskingum County, and in it there is, as usual, no thought or suggestion that the required changes can not be made because of lack of funds in the county treasury, and the refusal to make the alterations still proceeds upon the flat denial by the commissioners of the legal right of the Government to require the same.

And again, on August 20, 1890 (record transcript, p. 44), the said commissioners of Muskingum County addressed a communication to the Secretary of War relative to the alteration of this bridge in reply to the former's letter to them of August 8, in which they say:

> Upon due consideration the board of county commissioners have decided that they are not responsible for the obstruction named, and respectfully decline to take any action in the premises without a decision of the proper court.

And again, there is an utter absence of any suggestion of thought of a lack of funds with which to accomplish the required changes. Then follows the letter from Colonel Merrill to said commissioners, dated December 19, 1890 (transcript, pp. 45, 46), in which they were required to make certain specific changes in the bridge and were given until Tuesday, January 6, 1891, within which to appear and make any defense that they desired to make to said order. In reply to this communication the county commissioners answered, under date of December 23, 1890, and stated that inasmuch as sufficient legal advice has not yet been obtained by the board, it desires until February 1, 1891, to present its side of the case to

the engineer. (Record, p. 46.) This request was granted, and on February 3, 1891 (record, pp. 46, 47), the report was made upon said hearing by Lieutenant Gillette to Colonel Merrill, in which it is stated:

> I have to inform you that the county commissioners of this county were to-day given a hearing in the matter of the bridge * * * at Taylorsville-Duncan's Falls, in accordance with your letter of December 19, 1890. The commissioners stated that they would decline to make the changes required in the bridge, and submitted letters suggesting that the matter be referred on an agreed statement of facts to the United States court for this district; but on ascertaining that they had not been ordered to make the changes under the act approved September 19, 1890, they withdrew these letters and subsequently submitted two letters, which are inclosed herewith. I would suggest that a recommendation be sent to the Secretary of War that the necessary orders for the alteration of the bridge be sent immediately and that the time for making the alterations be limited to one month.
>
> In order that such limitation should not appear unreasonable, the order should state that the time would be extended at the request of the commissioners, if made before the expiration of the month. The reason of this is that the commissioners will not make the alteration until they are ordered to by the courts, and the sooner the matter is thrown into the courts the better it will be for all parties concerned, since the bridge can be altered best next season under cover of the Government cofferdam. *The commissioners are anxious to get the matter into the courts as soon as possible, and it was their suggestion that the time for the completion be limited.*

Pursuant to this recommendation, the Secretary of War issued the necessary notice on February 25, 1891, requiring the specific alterations in said bridge to be made and completed on or before September 30, 1891, and upon the willful failure and refusal of said commissioners to make the alterations as provided for in said order, proceedings were instituted against them in conformity with the provisions of the said act of September 19, 1890.

It will thus be observed that from the inception of this matter down to the actual hearing in the court below there was never any thought or suggestion on the part of the plaintiffs in error that the alterations in this bridge could not be made by them because of a lack of funds for that purpose. In the various hearings which the engineer officers gave to these gentlemen no such defense was ever offered. It was at no time pretended that the time notice within which the required alterations were to be made was unreasonable or improper, nor was any extension of it ever asked for by the plaintiffs in error.

On the contrary, as shown by this documentary evidence, the failure to comply with the orders of the Secretary of War was based upon a flat denial of the right of the Government to require such alterations or changes, except at its own expense, and the positive refusal to comply with the order, unless except and until so ordered by a court of competent jurisdiction; and in order that the legal questions involved might be determined as speedily as possible, the commissioners thus suggested and desired that the time be made as short as possible,

and it was even suggested that a limit of one month be specified in the order requiring the limitations.

Instead, however, of placing such a limit, the commissioners were given seven months within which to accomplish the work, and, as is shown by all of this correspondence, would undoubtedly have been granted any further additional time that they might have required or that the exigencies of the situation might have demanded if they had shown the slightest desire or intention of complying with the orders of the Secretary of War.

The fact that the absence of funds with which to make the required alterations was not relied upon as an excuse and was not presented as a reason why such time limit was unreasonable, as further shown by the testimony of J. F. Burgess, one of the plaintiffs in error, which is the only oral testimony bearing upon this subject. On page 31 of the transcript, he testifies as follows:

> Q. Didn't you give your refusal in the month of December to do anything?
>
> A. I don't remember just when it was.
>
> Q. Did you refuse to do it; did you make this question of want of funds any reason for refusing?
>
> A. I don't know that we did.

Colonel Merrill and Lieutenant Gillette both testify (record, p. 10 and p. 16) that the time within which said alterations were required to be made was, in their opinion, reasonable and ample. There is no testimony tending to show, and no pretense anywhere in the record, that the required alterations could not have been made within the time specified in the order, to wit, between February 25 and September 30, 1890.

If the work had been begun, or if the commissioners had levied the tax or taken any steps which evidenced an intention in good faith to comply with the orders of the Secretary of War, there can be no doubt, as gathered from the whole spirit and tenor of the correspondence upon this subject, as found in the transcript, that the time within which the changes should be made would have been cheerfully extended by the proper authorities. (See Transcript, p. 47.)

This bridge is a complete obstruction to the navigation of the Muskingum River (Record, p. 9 and p. 15). For example, Lieutenant Gillette, on page 15, testifies as follows:

> Q. Well, now, the bridge as it is there now, what obstruction, if any, is it to navigation of the river, Lieutenant?
>
> A. It is a perfect obstruction; a complete bar to the navigation of the river.

Now, shall this complete obstruction, this perfect bar to the navigation of the Muskingum River, be permitted to remain in place for an indefinite period of time, because, forsooth, there are no funds available in the county treasury with which to make the required changes which shall remove the obstruction to navigation, when the whole record and transaction shows that no effort has been made to obtain funds, that the absence of funds has never been urged as a reason for a failure to remove the obstruction, when the failure to remove the obstruction is due wholly to a denial of the right of the Government to require the same to be removed, and when there is no hope or promise that any funds ever will be available in the county treasury for this purpose?

It has already been shown in one of the answers of the county commissioners that they refused to levy a special tax for this purpose under and pursuant to the laws of the State of Ohio authorizing and empowering them so to do, because, as expressed by them, they desired to escape the criticism of the taxpayers; and we may take it as a governing principle that continues to the end in all county offices of this sort that this desire to escape from the wrath of the taxpayer is greater than a desire to obey the lawful orders of the Government of the United States, and the failure to obtain the requested funds by taxation in the future, as in the past, will be blocked by this fear of the wrath to come.

The only way in which the necessary funds for this purpose ever can or ever will be raised is to establish the legal duty of the county commissioners so to do by an affirmance of the judgment of the court below, and thus impose upon them an obligation enforcible by the arm of the law from which they can not escape. If we are to be told that under the provisions of this act a notice of this character is only reasonable when the time specified in it shall embrace such a period as finds the coffers of the county treasury filled with money which may be used for this purpose, then the statute, so far as it is to have any efficacy over public works of this character which are owned by any State or county or municipality, might as well be effaced.

There is some point made in the brief of the learned counsel for the plaintiffs in error to the effect that the order came too late to enable the county commissioners to obtain from the legislature a special act authorizing the

collection of money for this purpose; but here again we find the defense more imaginative than real. The only testimony in the record which bears at all upon this subject is in the cross-examination of Mr. Burgess, one of the plaintiffs in error, who, on page 31 of the transcript, testifies as follows:

> Q. When did you refuse to do it? Did you make this question of want of funds any reason for refusing?
>
> A. I don't know that we did.
>
> Q. Up to this point did you take any steps at any time to raise money for this purpose?
>
> A. I think it was done.
>
> Q. Well?
>
> A. Our members of legislature were talked to in that matter.
>
> Q. Did you get any authority?
>
> A. It was too late, too near the end of the session, and nothing was done.

It will be observed that there is no pretense that any bill was introduced into the legislature for that purpose. The witness merely says that "our members of the legislature were talked to about the matter"—evidently meaning by "our members" the members of the legislature from Muskingum County. The very best, therefore, that can possibly be made out of this testimony (and this is all there is on the subject), is that there was some sort of desultory conversation, perhaps, between the commissioners of Muskingum County and the members of the legislature from that county, concerning this matter generally, toward the close of the session.

It is not shown that any bill was introduced for the purpose, it is not shown that any effort was made to get

the sanction of the legislature, it is not shown that any *bona fide* attempt was ever, at any time, by anybody, in any way, made to raise the funds with which to make the required alterations in this bridge.

Under the charge of the learned judge below (p. 34), the question of the reasonableness of this notice was left to the jury, the language of the charge being as follows:

> That the Congress had the constitutional power to confer upon the Secretary of War the authority to determine when a bridge such as the bridge in question is an unreasonable obstruction to the free navigation of a river, and that the failure to comply, by the persons owning and controlling any such bridge, as by the defendants in this case, if they should so find, with such a determination by the Secretary of War, *after due notice* and otherwise full compliance with the act of Congress in that behalf, lawfully subjected thereto by prosecution for a misdemeanor, as provided by the act of Congress.

We submit, therefore, that the learned counsel for the plaintiffs in error are mistaken when they say that under this charge there was nothing left for the jury to do except to find the defendants guilty. The question of the reasonableness of this notice was left to the jury by this charge, and was passed upon by them in their verdict as guilty. And this judgment of the jury was sustained by the court in its refusal to set aside the verdict and grant a new trial, because the same was contrary to the law and the evidence.

There was no error in submitting this issue to the jury, nor was there any error in refusing to grant a new trial upon the ground that the finding of the jury to the

effect that this was a reasonable notice was contrary to law and evidence. The learned counsel for the plaintffs in error have cited the case of *Wiggins* v. *Burkham* (10 Wall., 132) and *Tolan* v. *Sprague* (12 Peters, 336) in support of the proposition that where the facts are clear what is a reasonable notice or a reasonable time is always a question exclusively for the court, and that therefore the court erred in failing to set aside the verdict of guilty, because they contend that the evidence clearly showed that the time allowed was unreasonable.

The record, however, does not support such contention. It was testified to by both of the witnesses on behalf of the Government (Record, pp. 10 and 16) that the length of time prescribed by this notice was a reasonable time within which to make the changes prescribed in the plan. No witness was introduced by the defendants below to dispute this, and it remains uncontradicted, and there is no pretense that the changes as prescribed by the plan could not have been made within the time specified.

The only evidence relied upon is that of one of the plaintiffs in error, who testifies in a hesitating sort of way that there were no funds available for that purpose (see record, pp. 30 and 31), without pretending that such failure of funds was ever assigned by the plaintiffs in error as a reason for their failure to comply with the orders of the Secretary of War, or that they ever requested an extension of time for that reason, or that they ever claimed the time given to be unreasonable for that reason, or that they ever made any effort at all to procure the funds with which to do the work.

The very best, therefore, that can possibly be made out of this testimony is that the evidence concerning the reasonableness of the time was conflicting; and under such conflicting evidence it became not a matter of law for the court, but a mixed question of law and fact to be submitted by the court to the jury in its instructions, just as was done by the court below. In the case of *Wiggins* v. *Burkham* (10 Wall., 133), while the court admits that where the facts are clear and undisputed a question of this sort is one for the court, yet the court says:

> Where the proofs are conflicting the question is a mixed one of law and fact. In such cases the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties.

The record does not show that the plaintiffs in error requested the court to instruct the jury upon any other hypotheses of fact for which they contended, nor is it shown that any prayer concerning this fact was asked for by the plaintiffs in error and denied by the court below. We submit, therefore, that the instructions of the court fail to show any prejudicial error to the defendants below upon which reliance can be had for the reversal here.

And this action by the trial court will not be disturbed by this court, especially when it is shown that this lack of funds is not and never has been the real reason for the failure to make the alterations and improvements required by the Secretary of War, but is a mere afterthought—a mere technical pretext—adverted to for the first time in the actual trial of the case and relied upon for the reversal of the judgment, when the real ground

of the refusal is the denial of the right of the United States to require the alterations to be made.

In the practical administration of this matter there will be no hardships, there will be no unreasonableness. If there is any *bona fide* lack of funds, or any *bona fide* application for the extension of time, there will be no difficulty in having such time extended, as the exigencies of the case may require. What is sought is an authoritative determination that the Secretary of War, under the provisions of the act of September 19, 1890, has the legal right to require this bridge to be so remodeled so as not to interfere with the navigation of the Muskingum River. This once established, the practical administration of that power may be safely left to the executive officers in whose hands the Congress has placed it.

It is therefore submitted that the judgment of the court below should be affirmed.

GEORGE HINES GORMAN,
Special Attorney for the United States.
JOHN K. RICHARDS,
Solicitor-General.

No. 40.
Sup. Ct. of Atty. Genl
v. Rickards

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, as county commissioners of Muskingum County, Ohio, plaintiffs in error,
v.
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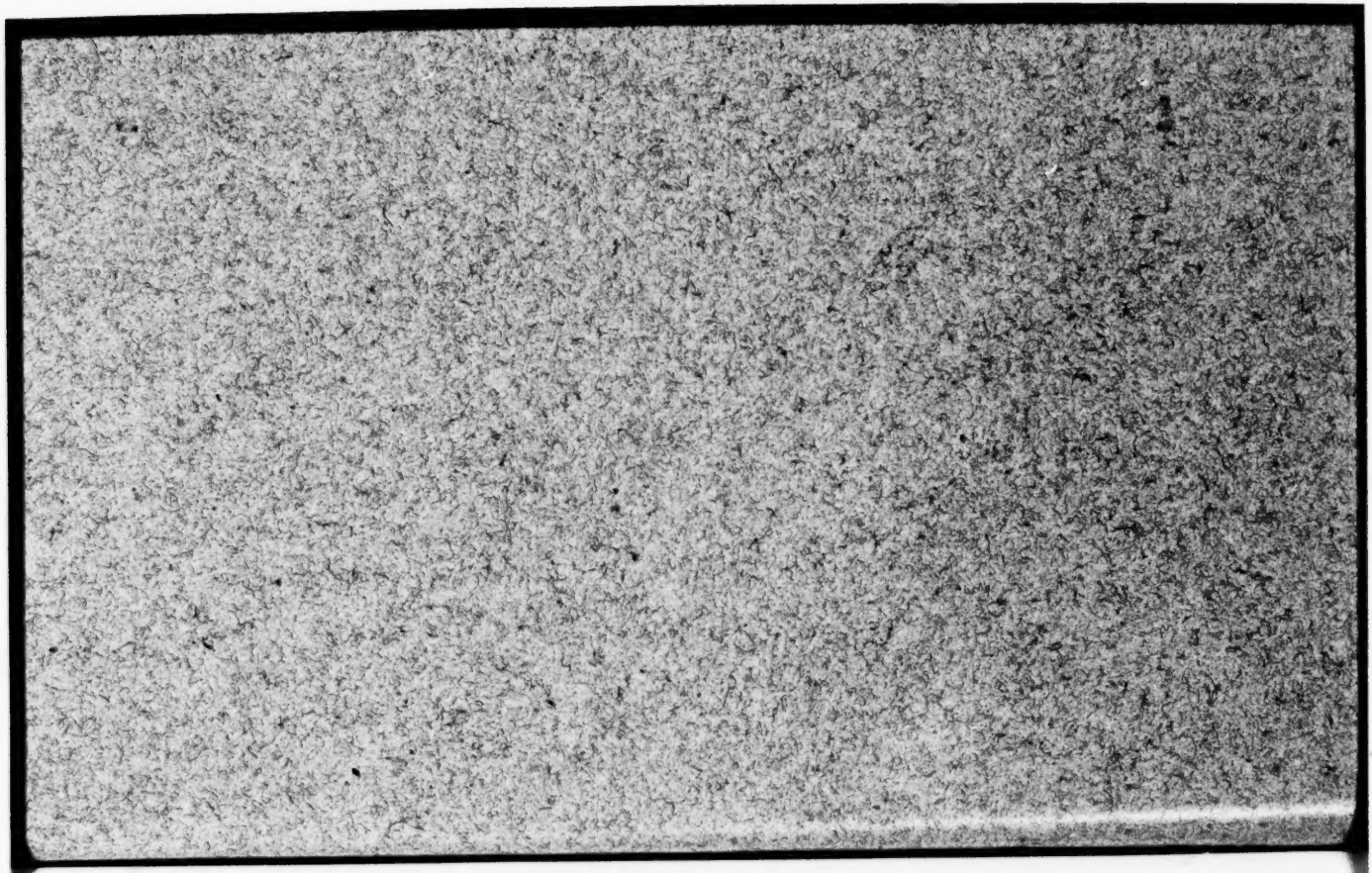
No. 40.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.



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In the original brief of the defendants in error it was contended that the doctrine which inhibits the redelegation of a delegated power is the limitation placed upon the principle that whomsoever does a thing through another shall be considered as having done the thing himself; and that the doctrine had to do primarily with the law of individual agency, but that the doctrine, so far as it be applied to the exercise of legislative functions

strictly by the legislative body is true only in a qualified sense and should not be taken in the strict application that is given to it when applied to the law of agency as affecting individuals; that the qualifications of this doctrine as applied to the exercise of governmental functions are becoming larger and larger every day, and must of necessity become larger as the demands of civilization increase, and that there is noticeable in all of the modern decisions a tendency in the direction of assigning duties hitherto deemed legislative, to other bodies, to boards and commissions, to local authorities, to executive officers, and particularly to the votes of the people themselves.

It is a noteworthy fact that in this court there has never been a decision whereby a law has been declared unconstitutional because it delegated to other agencies powers which this court thought could be only exercised by the Congress, and although such contention has been made in this court over a great number of acts of Congress, such a contention has never yet succeeded. In the State courts, however, there have been decisions against the constitutionality of laws of this character founded upon this reason, but such decisions were rendered in the early history of the country, when it was supposed to be necessary to draw the line sharply between the executive, the judicial, and the legislative branches of the Government, and when the governmental doctrines of Montesque were received with almost universal sanction; but the overwhelming trend of modern decisions is the other way, and the decisions invalidating such laws for such reasons have latterly come to be doubted or denied, or explained away, or openly reversed even in the supreme courts of

the States in which they were rendered. The multiplied activities and feverish unrest of our intense modern civilization precludes the possibility of a strict application of the academic theories which prevailed in the early days of the Republic. And the absolute necessities of modern life have produced in the courts a responsive limitation upon this as well as upon many another antiquated doctrine.

These results have not always been reached in the same way in the various courts, but their practical result remains always the same. Certain things have been held to be consistent with the rule that power can not be delegated, which, perhaps, in their ultimate analysis may be found to be, in fact, a delegation of authority rendered necessary in the practical administration of the Government. It is immaterial what nomenclature be used, whether the result brought about would be a modification of the maxim that power lodged in one department of the Government can not be delegated, or whether it be a refinement upon the facts as to whether or not there has been a real delegation. The practical solution of the problem is the same, and it has always been reached by a wise judiciary, whether pursuing one line of reasoning or another.

It becomes no less interesting than instructive to investigate the position of the various State courts upon questions of this character, and the object of the present supplemental brief is to make a brief, but comprehensive, examination into the present status of this doctrine as administered by the judiciary of the various States.

Questions of this character did not reach the State

courts in any quantity prior to 1850; such legislation before that time had been comparatively rare and of a kind not to involve any very important contending interests. As soon, however, as the legislatures began the passage of laws allowing counties, townships, and municipalities to subscribe to stock in railroads, which necessitated the increasing of tax levies, and laws prohibiting the liquor traffic, and of laws permitting the whole or a part of the people of the State to register their will upon the passage of certain acts, the issues were soon sharply defined and were taken to the courts for determination, and from this time on there were many judicial opinions given in the various State tribunals in regard to the constitutionality of this method of lawmaking, and that at this day nearly all the States of the Union have come to have an established policy on this subject. By far the most important class of cases in which this doctrine has been discussed have been those in which the proposed law was first submitted to ratification or rejection by a vote of the people, and the decision in this class of cases may be selected as illustrating the position of the State courts on this subject. The question has appeared in the courts in several forms and may be conveniently classified as follows:

First. Whether the legislature of a State could enact laws applying to local districts of the State, which depended for their effect upon the assent of the people inhabiting those districts.

Second. If the legislature possessed such power, then whether it could pass a law to be conditioned upon the popular consent on any subject, such as the licensing or

prohibition of liquor traffic, or to other police regulations, or only upon subjects affecting the local tax levies charged in county seats, county boundaries, and the like.

Third. Even if it could submit laws relating to the local districts, whether the legislature could submit laws to the people of the entire State.

The constitutionality of laws of this character was upheld in Massachusetts as early as 1826 (*Wales* v. *Belcher*, 3d Pick., 508), where the question arose upon the constitutionality of the law determining the jurisdiction of the courts in Boston, which was made to depend upon the contingency of the acceptance by the inhabitants of the town of Boston of an act which constituted that city a town. And in Virginia, as early as 1837 (*Goddin* v. *Crump*, 8 Leigh, 120), a State law was held to be constitutional which authorized the city of Richmond to subscribe to stock in a canal company, provided the people of said city gave their assent thereto in an election to be held for that purpose. The opinion in this case was delivered by Mr. Justice Tucker. And so in Maryland a law for the establishing of primary schools within such county of the State as should by popular vote determine to accept its provisions was upheld in 1844. (*Burgess* v. *Pue*, 2 Gill., 11.)

The case, however, which is usually referred to as being the first notable discussion of this question is that of *Rice* v. *Foster* (4th Harr., 479), which came before the supreme court of New Jersey in 1847, and arose upon the State act of February 18, 1849, "authorizing the people to decide by ballot whether licenses to retail

intoxicating liquors shall be permitted among them." The counties were to vote "license" or "no license" on the first Tuesday of April, 1847. The court of errors and appeals decided the law to be unconstitutional and placed their decision upon the ground that this was a delegation of legislative power to the people which could properly be exercised only by the legislature itself. In November of the same year the question came up for discussion in the supreme court of Pennsylvania in the case of *Parker* v. *The Commonwealth* (6th Barr., 507), which was a case also of local option liquor law and was held to be unconstitutional, which case was subsequently overruled. In the light of modern history it is amusing to read the reasons given by the courts in these two cases for their decisions, being founded, as they are, upon the timorous fear that such legislation would subvert the principles of a representative republican government into that of a democracy, and the reply to such fears by the supreme court of Illinois, rendered in 1848 in the case of *The People ex rel.* v. *Reynols* (5 Gilm., 1), is conclusive. The court there inquired that if, by leaving this question to the people, the republican form of government is to be overturned and its principles subverted by a miniature democracy, may not the same awful calamities be apprehended from a miniature monarchy? In that case the supreme court of Illinois upheld an act of the legislature whereby a question was submitted to the vote of a county whether the district embraced therein should be divided and organized into two counties, the court placing its decision upon the thoroughly sound principle that a law may depend upon

a future event or contingency for its taking effect, and that that contingency may be made to arise from the voluntary act of others.

A decision arising out of a local option liquor law, similar to those which had been recently declared unconstitutional in Delaware and Pennsylvania, was delivered by the supreme court of Vermont in 1849, in the case of *Bancroft* v. *Dumas* (21 Vt., 456), wherein the constitutionality of the law was upheld, and the Vermont court fortified itself in this opinion in 1854, in the case of the Maine liquor law (*State* v. *John Parker*, 26 Vermont, 35), and in this case the court said:

> It is admitted on all hands that the legislature may enact laws the operation or suspension of which shall be made to depend upon a contingency. This could not be questioned with any show of reason or sound logic. It has been practiced in all free States for hundreds of years, and no one has been lynx-eyed enough to discover or certainly bold enough to declare that such legislation was on that account void or irregular, and it is, in my judgment, a singular fact that this remarkable discovery should be first made in the free representative democracies of America.

And certainly in all of the years since then it has been the habit of the people of the States to cure this dreaded disease of democracy by the application of more democracy in true homeopathic style—*similia similibus curantur*. In 1849 the court of appeals of Kentucky declared to be constitutional an act of the legislature authorizing a vote of the people of Louisville upon a proposition to subscribe stock of a railroad company. (*Talbot* v. *Dent*, 9

B. Mon., 526.) See also *Slack* v. *The Railroad Company* (13 B. Mon., 1).

In 1853 the court of appeals of New York rendered a decision, which has since become famous, in which the positions previously taken by the courts of Delaware and Pennsylvania in *Rice* v. *Foster* and in *Parker* v. *The Commonwealth*, respectively, were upheld. This case (*Barto* v. *Himrod*, 4 Seld., 483) turned upon the constitutionality of an act which the legislature had passed in 1849, known as the free-school law, which was not to go into effect until ratified by the people at an election to be held for that purpose, and the court held the law to be unconstitutional as a delegation to the people of legislative functions.

A case arising out of a law authorizing a vote of stock in aid of a railroad company reached a decision in the supreme court of Ohio in 1852 (*Railroad Company* v. *Clinton County*, 1 Ohio State, 77), in which the court, although recognizing the general principle that a general assembly can not surrender its legislative functions, yet it is permissible for the legislature to pass a law requiring the intervening assent of other persons or containing provisions preventing such law from taking effect only upon the performance of conditions expressed in the law. The discretion given in such a law relates only to its execution. It may be employed or not employed; if employed, it rules throughout; if not employed, it still remains the law, ready to be applied whenever the preliminary condition is performed.

From this time on there have been many judicial opinions given in the State tribunals in regard to the consti-

tutionality of this method of lawmaking, and nearly all of the States of the Union have by this time come to have an established policy on this subject. By far the larger number of decisions have been in favor of the method, but the courts have found different lines of argument, some reaching their conclusions in one manner and some in another. Those States which may be regarded as favoring this method of legislation are Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, and Wisconsin.

In Alabama (*Clark* v. *Dorincy*, 60 Ala., 271) and Colorado and Nebraska the constitutionality of this method of legislation has been recognized, though in no very notable cases.

In Arkansas the validity of local option laws was recognized in 1879 (*Boyd* v. *Bryant*, 35 Ark., 69). This opinion was subsequently reaffirmed and amplified in the case of *Trammel* v. *Bradley* (37 Ark., 374), where the court, while recognizing the general doctrine that a legislature could not delegate the power to legislate, yet affirmed that it could make a law to depend upon a contingency, which contingency might be a favorable vote of the people. The court said:

> It must be confessed that the question was not originally without grave difficulties; but now, upon a view of all the authorities and weighing the dangers and inconvenience of each side, the court

adheres to the views taken in *Boyd* v. *Bryant*, and this, we think, is sustained by the weight of authority, as well as of reason.

In Connecticut the local option law of 1874 was declared to be constitutional in the case of *State* v. *Wilcox* (42 Conn., 364); and in this case the court drew a distinction between the means of exercising a power by the people and by the legislature, and were of opinion that the people could more intelligently exercise the discretion and judgment upon matters of this sort than could the legislature itself, and that the doctrine which inhibits the redelegation of delegated powers was not applicable to a case of this sort, because no power was delegated which the constitution required the legislature to exercise, and that the power so delegated was not, properly speaking, legislative in its character, and might be more appropriately exercised by the municipalities and local functionaries to whom it was committed.

In Florida the question came before the supreme court in 1856, in an attack that was made upon the constitutionality of an internal improvement law, whereby counties, cities, and towns were empowered to subscribe stock to railroads after securing the popular assent. The court held that this was not a delegation of legislative power, but only a legitimate mode of obtaining an expression of the will of the constituent as a guide for the action of the representative. (*Cotton* v. *The County Commissioners of Leon County*, 6th Fla., 610.) Subsequent decisions in this State are of similar effect. (*State* v. *Brown*, 19th Fla., 593; *Commissioners of Lake County* v. *The State*, 24th Fla., 263.)

In Georgia a distinction appears to obtain similar to that which obtains in New York, between the constitutionality of an act which submits local questions to a vote of the people, and those which submit the question to the people of the whole State, the former being upheld and the latter condemned. And, while no act which submitted the question to the people of the whole State has ever been declared to be unconstitutional in this State, yet the New York distinction is recognized as a sound one in the opinion of the court in the case of the *Mayor of the City of Brunswick* v. *Finney* (54 Ga., 317), but the court recognizes such distinction "without committing ourselves upon the general principles." The constitutionality of the act permitting a change in the charter of the city of Brunswick, which the legislature prescribed should not go into effect until assented to by a vote of the people of that city, was declared to be constitutional, and so was the act of 1883, passed to prohibit the sale of liquor in Pike County, submitting the question of the law's acceptance or rejection to the voters of that county (*Caldwell* v. *Barret*, 73 Ga., 604).

In Illinois the principle that the people had a right to a direct share in the making of their laws was very early established, the leading case being that of *The People ex rel.* v. *Reynols* (5 Gilm., 1), which has already been adverted to, and in which case the principle was stated that a law might depend upon a future event or contingency, and that contingency might be an approving vote of the people. This principle has been restated by the court several times and is now the settled law of the State. (See *People ex rel.* v. *Solomon*, 51 Ill., 37; *Home Insur-*

ance Company v. *Swigert*, 104 Ill., 653; *The People ex rel.* v. *Hoffman*, 116 Ill., 587.)

In Kansas legislation of this kind was approved in 1865, authorizing the counties and cities, on a vote of the people, to subscribe stock to railroad corporations. (*Leavenworth County* v. *Miller*, 7th Kans., 298.) In *Noffzigger* v. *McAllister*, decided in 1873 (12th Kans., 250), the "Night herd law" of 1868, authorizing county commissioners to order stock shut up at nighttime, upon petition of the majority of the electors of the county, was sustained, the court saying that "the act resembles many other acts which depend for their practical operation upon the discretion of the county board, or the people, or the happening of certain contingencies." And in 1868, in the case of *State ex rel. Hunter* (38 Kans., 578), the court said:

> The validity of laws, the operation of which is made to depend upon the occurrence of some future event or contingency, certain or uncertain, can not well be doubted; that contingency may be the vote of petition by a certain number of the people to be affected by the law.

In Kentucky this method of legislation was declared to be constitutional in 1849 in the case of *Talbot* v. *Dent* (9 B. Mon., 526), and in 1852 in *Slack* v. *Railroad Company* (13 B. Mon., 1), both of which have already been referred to. In 1877 (*Anderson* v. *The Commonwealth*, 13 Bush., 485) the court upheld a local-option law, and in another opinion concerning the same law (*Commonwealth* v. *Weller*, 14 Bush., 218) the court said:

> The legislature, by the passage of the act we are considering, had already determined its expediency,

> and we perceive no reason why its going into operation should not be made to depend upon a vote in favor of the measure. That a statute may be conditional, and its taking effect be made to depend upon some subsequent event, is now well settled.

And the views here expressed were reaffirmed in 1877 in the case of *Burnside* v. *Lincoln County Court* (86 Ky., 423).

In Louisiana, the supreme court in the case of *Police Jury* v. *McDonough* (8 La. An., 341), said:

> If the legislature could constitutionally confer on the police jury authority to pass a taxing ordinance it would seem rather a safeguard against oppression than the reverse to qualify the power of requiring it to be exercised with the approbation of the majority of those who are to bear the burden. * * * We find nothing in the statute of 1852 repugnant to the constitution or the support of representative government, and it seems a matter of surprise to us that the caution of the legislative in its grant of the taxing power should be made the subject of reproach.

This view was affirmed by the court in *New Orleans* v. *Graihle* (9 La. An., 561), a case arising out of the same law of 1852 relating to subscriptions of stock to railroad companies.

In Maryland a law establishing a system of primary schools in those counties which should vote to accept the provisions of the act was declared constitutional in *Burgess* v. *Pue* (2 Gill., 11), which case has already been referred to. The same question arose in a case between the same parties, reported in 2d Gill., 254, and the constitutionality of the law was again sustained. A like decision was rendered in 1866, in the case of *Hammond* v.

Haines (25th Md., 544), and the constitutionality of the law authorizing the voters of a borough to decide by ballot whether or not licenses should be granted to sell liquor was likewise fully sustained in 1874 in the case of *Fell* v. *The State* (42d Md., 71).

In Massachusetts the policy of the supreme court in such cases was established as early as 1826, in the case of *Wales* v. *Belcher* (3d Pick., 508), which opinion has already been adverted to. The case of the *Commonwealth* v. *Bennet* (108 Mass., 27), decided in 1871, arose out of the local-option liquor law, and in that case the court said:

> It has been argued that these statutes are unconstitutional because they delegate to cities and towns a part of the legislative power, but we can see no ground for such position; many successive statutes of the Commonwealth have made the lawfulness of sales of intoxicating liquors to depend upon licenses from the selected men of towns, or commissioners of counties, and such statutes have been held to be constitutional. It is equally within the power of the legislature to authorize a town, by a vote of its inhabitants, or a city, by a vote of its council, to determine whether the sale of particular kinds of liquors within its limits shall be permitted or prohibited.

In Minnesota (*Ross* v. *The State*, 6 Minn., 291) the State supreme court declared constitutional a law submitting to popular vote a proposition for the removal of the county seat, the court saying that the law "was as much a law prior to the vote of the people as subsequent to that event, its operative force being suspended, merely its validity being dormant. It is precisely the same

case as the passage of the law by the legislature made to take effect upon the happening of any other event, such as a future day, which is the most usual course.

In Mississippi the statute was sustained which authorized a vote of the people upon a proposition to tax to aid in repairing and perfecting the levees on the Mississippi River. The court, in this case, recognized the principle contended for, but reached the conclusion that a power to enact a law includes in it the power to determine and prescribe the conditions upon which a law may come in operation, and was of opinion that this contingency may as well be a vote of the people as anything else. (*Alcorn* v. *Haymer*, 38 Miss., 652.) This decision was rendered in 1859. In the later case of *Barnes* v. *Board of Supervisors of Pike County* (51 Miss., 305), decided in 1875, the constitutionality of an act submitting to the people of Pike County the choice of a permanent location of their county seat was upheld. And in the case of *Schulherr* v. *Bordeaux* (64 Miss., 59), decided in 1886, the court said:

> On the question of the right to make an act of the legislature depend for its operation upon a future contingency, argument was exhausted long ago, and the principle established by oft repeated examples and by adjudication in this State and elsewhere in great numbers that this may be done without violating the constitution.

In Missouri the doctrine of the supreme court is made to rest upon the distinction between an unconstitutional delegation of power and the right of the legislature to pass an act to take effect upon the happening of a future

contingency, and was expressed by that court in 1887 as follows:

> While the rule that the legislature is only invested with the power to make laws, and that it can not delegate to the people the power to pass a law, does not admit of question, there is another rule just as formally and indisputably established, which is that the legislature may pass a law to take effect or go into operation on the happening of a future event or contingency, and that such contingency may be a vote of the people. (*State ex rel. Maggard* v. *Pond*, 93 Mo., 606.)

In New Hampshire the New York distinction prevails, and while laws depending for their operation upon the votes of localities are upheld, an act to be submitted to the whole people at a regular biennial election was declared to be unconstitutional. (See *State* v. *Noyes*, 10 Foster, 279, and *State* v. *Hayes*, 61 N. H., 264.)

In New Jersey an act submitting to the voters of a town the proposition whether or not they would become an incorporated town was sustained, and likewise have cases arising from local-option laws. (See *City of Paterson* v. *The Manufacturers*, 4 Zab., 385; *State* v. *The Court of the Common Pleas of Morris Co.*, 36 N. J., 72; *Hall* v. *Gloucester Co.*, 50 N. J., 585.)

In New York the case of *Barto* v. *Himrod*, which has already been adverted to, and in which a decision was rendered against the submission of laws to the people, the court of appeals was soon compelled to modify its opinion. In 1858, in the case of the *Bank of Rome* v. *The Village of Rome* (18th N. Y., 38), a law authorizing municipal corporations to submit to electors who were tax-

payers the question of subscribing money to aid in the construction of railroads was declared to be constitutional. The court held that this was not a delegation of legislative power, within the scope of *Barto* v. *Himrod*, and a distinction was drawn between acts relating to the whole State and those relating to local communities. The court further explained this distinction in the case of the *Bank of Chenango* v. *Brown* (26th N. Y., 467), in the following words:

> It is a material distinction between the cases (this case and *Barto* v. *Himrod*), that the people of a particular municipality or local bodies are not the constituents of the legislature. They are not the people of the State of New York who have irrevocably committed their power of legislation to the legislature by a delegation, which does not permit that legislature to remand any legislative question to their constituency.

This position, to say the least of it, is unique, and it has been repudiated by the supreme courts of a number of States. (See *Manly* v. *The City of Raleigh*, 4 Jones Eq., N. C., 370; *Smith* v. *The City of Janesville*, 26 Wis., 291, 295; *Fill* v. *State*, 42 Md., 71.) The opinion of the court in *Bank of Chenango* v. *Brown*, *supra*, was affirmed in the case of *Clark* v. *The City of Rochester* (28 N. Y., 605), which was a case involving the constitutionality of a law submitting to the inhabitants of Rochester a proposition to subscribe stock to a railroad company. The court in this case explained its position somewhat more fully, saying:

> While general statutes must be enacted by the legislature, it is plain that the power to make local

> regulations having the force of law in limited localities may be committed to other bodies representing the people in their local division or to the people of those districts themselves. Our whole system of local government in cities, villages, counties, and towns depends upon that distinction. The practice has existed from the foundation of this State and has likewise been considered a permanent feature in the American system of government. * * * I do not say that it can be submitted to the electors of a city or village to determine what power its local legislative shall possess, but only that these bodies may be made the depositors of such powers of local government as the legislative may see fit to prescribe and the exercise of which is not repugnant to any of the general arrangements of the Constitution.

In a subsequent case the court upheld the provision in a village charter providing for the submission of the question of license or no license (*The Village of Gloversville* v. *Howell*, 70 N. Y., 287).

In North Carolina the supreme court, in the case of *Manly* v. *The City of Raleigh* (4th Jones Eq., 370), which was decided in 1859, and in which the opinion was delivered by the celebrated Chief Justice Pearson, declared that the legislature could pass laws depending on the vote of the people. It reviewed at length the case of *Barto* v. *Himrod*, and said:

> This decision and the reasoning offered in support of it fail to satisfy us that the legislature has *not the power* to pass a law depending upon a vote of the people or the acceptance of the corporation. It is certain that the legislature has the power to pass a law to ascertain these facts, and may afterwards make

a law in conformity thereto; so, in its practical result, it makes no difference which act precedes the other. In the instance of the division of the county of Surrey and also that of the free schools in New York, subsequent acts were passed confirming the first, and in regard to the latter no question as to the power of the legislature could be raised. It is not denied that a valid statute may be passed to take effect upon the happening of an uncertain future event, upon which the legislature, in effect, declares the expediency of the law to depend, and when it is provided that a law shall not take effect unless a majority of the people vote for it, or it is accepted by a corporation, the provision is, in effect, a declaration that in the opinion of the legislature the law is not expedient unless it be so voted for or accepted.

It seems to us that the court in New York fell into error by not discriminating between a *want* of power and an *abuse* of power. All legislative power is vested in the general assembly, restricted only by the constitution. There is no prohibition in the constitution against this method of legislation, consequently, although it may be an abuse of power, greatly to be deprecated, as tending to subvert the principles of our representative form of government, still the power has been granted, and it is not the province of one branch of the government to correct the supposed abuse of another. The judiciary can only interfere when the legislature acts without power, that is, in violation of the constitution.

The views expressed by the court in this case have been sustained in numerous subsequent decisions, as in *Cain* v. *The Commissioners* (86 N. C., 8), a case arising out of a fence law. The court decided that this was not a transfer of legislative power to the people, it simply be-

ing a law to take effect upon the happening of a contingent event. (See also *Newson* v. *Earnheart*, 86 N. C., 391.)

In Ohio the doctrine of the supreme court on this subject was announced as early as 1852, in one of the most vigorous opinions to be found in the books and one which has been as extensively quoted, perhaps, as that of any decision upon this subject, and which we find quoted with approval by the Supreme Court of the United States in the case of *Field* v. *Clark* (143 U. S., p. 694). I refer to the case of the *Railroad Company* v. *Clinton County* (1 Ohio State, 77). That case arose upon a statute authorizing counties and other local subdivisions of the State to subscribe to the capital stock of a railroad, the subscription being conditioned upon the consent of the people. The constitutionality of the act was upheld and the court said:

> Such a law is perfect, final, and decisive in all its parts, and the discretion given only relates to its execution. It may be employed or not employed. If employed, it rules throughout; if not employed, it still remains the law ready to be applied whenever the preliminary condition is performed. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involved a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made.

In 1889, in the case of *Gordon* v. *The State* (46 Ohio State, 607), the constitutionality of the township local

option liquor law was upheld, the court being of opinion that in the exercise of the duties devolving upon a legislative branch of the State government discretion and judgment are required, not only in determining the subject-matter of the legislation, but in ordering the conditions or contingencies upon which laws are to be carried into effect, and that it was entirely permissible for the legislative body to condition the going into effect of such a law upon the happening of a particular event or contingency thereafter to arise, or upon the performance of some specific condition, and that in so doing they were not delegating to others functions which they themselves should have exercised.

In Pennsylvania the opinion given in *Parker* v. *The Commonwealth*, in 1847, and which has already been adverted to, holding unconstitutional a local-option law, was gradually modified and afterwards directly reversed. Only one year after this decision the same court decided in favor of a law submitting the question of township division. The court found a distinction between this question and the liquor question, which was the subject-matter of *Parker* v. *The Commonwealth*, and said that "If the legislature can authorize the courts to decide questions of this character, they can also authorize the people primarily to do so. If the power can be given to a selected few, it can also be delegated to all the inhabitants of a district, unless positively prohibited." This view was also taken in *Commonwealth* v. *Painter* (10th Barr., 214) and in *Moers* v. *The City of Reading* (21 Pa., 188). In 1873, in the celebrated case of *Locke's appeal* (72 Pa., 491), the case of *Parker* v. *The Commonwealth*

was directly reversed, the law under review in each case involving the right of the people in their local districts to prohibit the sale of liquor. This, likewise, is one of the most celebrated cases to be found on this subject, and has likewise been most extensively quoted by other courts in support of the doctrines there announced, and it is quoted with approval by the Supreme Court of the United States in the case of *Field* v. *Clark* (143 U. S., at p. 694). The decision in this case was rendered by Mr. Justice Agnew, and in the course of the opinion it was said:

> The law is simply contingent upon the determination of the fact whether licenses are needed, or are desired. And why shall not the legislature take the sense of the people? Is it not the right of the legislature to seek information of the condition of a locality, or of the public sentiment? The constitution grants the power to legislate, but it does not confer knowledge. The very trust implies that the power should be exercised wisely and judiciously. Are not the public sentiment and local circumstances just subjects of inquiry? A judicious exercise of power in one place may not be so in another. Public sentiment or local condition may make the law unwise, inapt, or inoperative in some places and otherwise elsewhere. * * * So long, therefore, as the legislature only calls to its aid the means of ascertaining the ability or expediency of a measure, and does not delegate the power to make the law itself, it is acting within the sphere of a just power.

The court then goes on to formally overrule the case of *Parker* v. *The Commonwealth*, and delivers itself of these sentences, which have become famous, so often have

they been quoted with approval by the courts of the various States and by the Supreme Court of the United States:

> The true distinction I conceive is this: The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or set of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government.

The opinion concluded as follows:

> I have not thought it necessary to refer to the decisions in other States, for the plain reason that our own decisions since *Parker* v. *The Commonwealth* ruled the case, while that case was the forerunner of the decisions in all the other States, except Delaware, and with its fall they have lost their chief prop and support.

In Tennessee the supreme court found the submission of laws to the people to be constitutional, as early as 1854, in a case arising out of the internal improvement act of 1852 (*Railroad Company* v. *Davidson County*, 1 Sneed, 640).

In Vermont the supreme court decided in favor of the constitutionality of submitting laws to the people for ratification, as early as 1849, in the case of *Bancroft* v. *Dumas* (21 Vt., 456), which arose out of the State liquor-license law of 1846, wherein provisions were made for an annual vote of the people of all the counties throughout the State on the license question. The court held that the fact that all of the people of the State were to vote upon this question did not invalidate the law any more than if

only a portion of them were to vote thereon. The Delaware case of *Rice* v. *Foster* and the Pennsylvania case of *Parker* v. *The Commonwealth* were reviewed and dissented from. The views of the court in this case were subsequently reaffirmed in 1854 in *The State* v. *Parker* (26 Vt., 35), which came up upon the "Maine liquor law," which had been enacted by the Vermont legislature in 1852, and was submitted to the people. These decisions have all been sufficiently adverted to.

In Virginia the supreme court of appeals, in *Goddin* v. *Crump* (8 Leigh, 20), declared constitutional a law submitting to the people of Richmond the question of subscribing stock to a canal company. The subject was further reviewed by the court in 1855, in *Bull* v. *Read* (13 Gratt., 78), upon a statute providing for the establishment of a system of free schools in a particular district or county, the act not to go into effect until the people of the district should approve it at an election to be held for that purpose, in which the court said:

> It will be conceded that the legislature may provide that an act shall not take effect until some future day named, or until the happening of some particular event, or in some contingency thereafter to arise, or upon the performance of some specific conditions (citing a number of cases in which such laws have been passed by the State and Federal governments). Now, if the legislature may make a portion of an act depend upon some contingency thereafter to happen, or may prescribe conditions, it must be for them to judge in what contingency or upon what condition the act shall take effect. They must have the power to prescribe any they may think proper, and if the condition be that a vote of

> approval shall first be given by the people affected by the proposed measure, it is difficult to see why it may not be as good and valid as any other condition whatsoever. * * * To say that in such a case the act is made by the voters and not by the legislature is to disregard all proper distinctions and involves an utter confusion of ideas upon the whole subject.

This position was further affirmed in the case of *Savage* v. *The Commonwealth* (84 Va., 619), wherein was cited with approval the previous case of *Bull* v. *Read* in 13th Gratt.

In Wisconsin this system of making laws was reviewed by the court in the case of *State* v. *O'Neill* (24 Wis., 149). The legislature had passed an act establishing a board of public works in Milwaukee, which, however, was to be null and void unless approved by the people at an election to be held in 1869. It was contended that this law was not enacted by the will of the legislature, but that the latter had merely proposed it and referred it to the people of Milwaukee. The court said that the act was what is termed in books a conditional one, and was to take effect or go into operation upon a contingency provided in the law itself. It is a complete enactment in itself, contains an entire and perfect declaration of the legislative will, requires nothing to perfect it as a law, still it is only left to the people to be affected by it to determine whether they will avail themselves of its provisions. And the same doctrine is announced in the case of *Smith* v. *The City of Janesville* (26 Wis., 291). In this case the act of the legislature of 1866 was held not to be invalid, because by its terms it was to take

effect only after it should be approved by a majority of the popular votes of a whole State at a certain election, and it was admitted in this case, to draw a distinction similar to that which exists in New York between the referees of a State to a particular locality or municipality, and the reference of it to the people of the whole State, but the court was of opinion that there existed no real distinction. The court said:

> It being conceded that the legislature possesses this general power, the only question here would seem to be whether a vote of the people in favor of the law is to be excluded from the number of those future contingent events upon which it may be provided that it shall take effect. A similar question was before this court in the case of *State* v. *O'Neill*, and was very elaborately discussed. We came unanimously to the conclusion in that case that a provision for a vote of the electors of the city of Milwaukee in favor of an act of the legislature, before it should take effect, was a lawful contingency, and that the act was valid. That was a law affecting the people of Milwaukee particularly, while this one affects the people of the whole State. There the law was submitted to the voters of that city, and here it was submitted to those of the State at large. What is the difference between these two cases? It is manifest on the principles that there can not be any. The whole reasoning of that case goes to show that this act must be valid, and so it has been held in the best-considered cases, as will be seen by reference to that opinion. We are constrained to hold, therefore, that this act is and was, in all respects, valid from the time it took effect, and consequently there was no want of authority for the levy and collection of the tax in question.

The States which have apparently taken the opposite view of this question are California, Iowa, Nevada, New Hampshire, and Texas. In California, in the case of *Upham* v. *The Supervisors of Sutter County* (8th Cal., 379), decided in 1857, that a law submitting to the people of the county the question of the location of their county seat was constitutional, and in *Blanc'ing* v. *Burr* (13th Cal., 343) and *Hobart* v. *The Supervisors of Butte County* (17th Cal., 24), the submission to popular vote of laws relating to local districts was likewise declared to be constitutional. But in 1874 the California court, in the case of *Ex parte Wall* (48 Cal., 279), appears to have undergone a change of mind on this subject and to have become affected with the fear of an approaching democracy to such an extent as to overtly overrule its previous decisions. In that case the court said:

> Our Government is a representative republic, not a simple democracy. Whenever it shall be transformed into the latter, as we are taught by the examples of history, the tyranny of a changeable majority will soon drive honest men to seek refuge beneath the despotism of a single leader. * * * On the question of the expediency of the law, the legislature must exercise its own judgment definitely and finally. If it can be made to take effect upon the occurrence of an event, the legislature must declare the law expedient, if the event shall happen, but inexpedient if it shall not happen. They can appeal to no other man or men to judge for them in relation to its present or future propriety or necessity. They must exercise that power themselves and thus perform the duty imposed upon them by the Constitution.

It will thus be seen that the decision in this case was brought about by the nightmare of a future unlimited democracy to come. The court's position, that to permit people who are affected by the laws to vote directly for or against them, would drive honest men to "seek refuge beneath the despotism of a single ruler" seems tantamount to a declaration that a majority of the people are dishonest and only the minority are honest—a proposition which seems to be entirely out of tune with the whole spirit and genius of our institution. At all events the argument of the court is purely chimerical and is not founded upon any legal reasons whatever. Since the rendition of the decision in this case, the court in the case of *The People* v. *Nally* (49 Cal., 478), and *The People* v. *McFadden* (81 Cal., 489), has declared constitutional two laws submitting to popular vote propositions for change in county boundary, and it would therefore seem that the supreme court of California is halting between two opinions on this subject.

In Indiana the decisions are by no means uniform or reconcilable. In 1853, in the case of *Maize* v. *The State* (4th Ind., 342), the supreme court declared a local-option law to be unconstitutional, because the court was afraid that by the passage of such laws the Government would be changed from a representative republic into a pure democracy, such as Athens was, and the court thought that if one enactment might be submitted to such a vote, they all might be so submitted, and that the representative system of the Government would be wholly subverted. In a later case, the case of *Greencastle Township* v. *Black* (5th Ind., 557), the court adhered to its decision

in the Maize Case, and found to be unconstitutional a law authorizing the people of townships to vote to tax themselves for school purposes. On the other hand, in 1869, the supreme court admitted the constitutionality of a law authorizing counties and townships, with the popular consent, to subscribe stock to railroad companies. (*The Railroad Company* v. *Geiger*, 34th Ind., 185). And the court was still further led away from the doctrines laid down in the Maize Case in the case of *Groesch* v. *The State* (42 Ind., 547). And in this case, while the Maize Case was not in terms overruled, yet the doctrines there announced are so wholly antagonistic to those laid down in the Maize Case and in the case of *Greencastle Township* v. *Black*, and those cases are so discredited by the court's citing numerous cases from other statutes directly in their teeth, that it may now be very safely said that the policy of the supreme court of Indiana is in favor rather than against this method of legislation.

In Iowa the supreme court decided, in 1855, a law for the submission to a vote of the people of the entire State concerning a prohibitory liquor law to be unconstitutional. (*Santo* v. *The State*, 2 Iowa, 165.) And in *Geebrick* v. *The State* (5 Iowa, 491) a local-option liquor law was likewise declared to be unconstitutional. In *Dalby* v. *Wolfe* (14 Iowa, 228) a local-option stock law, by a most intricate and by no means lucid process of reasoning, was distinguished from a local-option liquor law and was held to be valid. But in 1871, in the case of *The State* v. *Wier* (33 Iowa, 134), another local-option liquor law was declared to be unconstitutional, and in the case of *Wier* v. *Cram* (37 Iowa, 649) a

local-option stock law was declared to be unconstitutional. The supreme court of this State has been so vacillating in its position on this subject and has been led into so many conflicting decisions that it can not be said to have any policy on the subject whatever. It appears to depend entirely upon the personnel of the court at the time the case is reached.

In Nevada there was a decision rendered in 1869 in the case of *Gibson* v. *Mason* (5th Nev., 283), wherein it was decided that an act of the legislature which depended upon the approval of the votes of the people was unconstitutional.

In New Hampshire the New York distinction obtained, and while laws which are submitted to the people of local districts have been sustained, the court in 1881 (*State* v. *Hayes*, 61 N. H., 264) declared to be unconstitutional a law which had been submitted to the people of the whole State providing for minority representation in corporations.

In Texas, in 1856, a local-option liquor law was declared to be unconstitutional. (*State* v. *Swisher*, 17 Tex., 441). This opinion, however, has been repeatedly explained away and overruled. See *San Antonio* v. *Jones* (28 Tex., 32) wherein a law submitting to the people of the city whether it should subscribe for railroad stock was declared to be constitutional. See also *Werner* v. *The City of Galveston* (72 Tex., 22); *Johnson* v. *Martin* (75 Tex., 33), wherein it is said that the privilege of the electors of a district to be affected by a law to say whether they will accept its provisions, the law giving them the right to accept or reject it, is generally permitted and re-

garded as constitutional. And so a local-option liquor law, passed in 1876, was thoroughly reviewed in 1883 by the court of appeals (14 Tex. Court of Appeals, 505), and the rule stated to be that although the legislature could not delegate the power to make laws it could enact a law to delegate the power to determine some fact or state of things upon which the validity of the law may depend, which fact or state of things may be a vote of the people. So that the latest and best-considered opinions in this State place it in the affirmative instead of the negative column on this subject.

Thus it will be seen that the overwhelming weight of authority is decidedly in favor of the method of submitting laws to popular vote, and while there have been several adverse decisions, they were most of them delivered many years ago, when thought on the subject had made but little progress. The validity of this system of legislation was recognized in New England, where the town meeting was in use, from a very early time, and it was not possible that the other States would remain far behind in learning the utility and convenience of this plan of local government.

Leaving aside the decisions in the case of *Rice* v. *Foster* and *Parker* v. *The Commonwealth*, which were both decided about 1850—the latter case being reversed in its own State in the case of *Locke's Appeal* in 1874—and the case of *State* v. *Swisher*, which has been subsequently explained away in its own State, and the case of *Maize* v. *The State* and *Greencastle Township* v. *Black*—all of which were decided prior to 1860, and all of which have been very much modified even in their own States—the

tendency of the courts has been steadily in favor of this system of lawmaking. Really the only cases in which this method of legislation has been declared to be unconstitutional are the cases of *Ex parte Wall* in California, the case of *Geebrick* v. *The State*, in Iowa, and in *Lammert* v. *Lidwell*, in Missouri; but these decisions are exceptional and stand unsupported by the best judicial authority, and are denied by the overwhelming weight of decisions to the contrary.

It is to be noted that the decisions against this method have been in cases which drew in question the constitutionality of local option liquor laws. The direct question has been embarrassed by extra judicial opinions which have not contributed to give unbiased expression of the court's views. The liquor question touches the daily living customs of the people, and men, even those presiding over courts, are sometimes unable to rid themselves of prejudices and discuss this subject as they would others. This opinion is induced by a reading of the deliverances of many State courts on liquor cases. Personal feeling has been brought plainly into evidence in a number of cases, but never more plainly than in the dissenting opinion in Locke's appeal by the chief justice of the supreme court of Pennsylvania, wherein the judge stated his own habits regarding the use of liquor and introduced other extraneous arguments in nowise bearing upon the legal side of the case.

The objection to the practice of submitting laws to popular vote has generally been made to turn upon the proposition that it is inconsistent with the representative

principles, and that the theory of our Government is subverted by transferring the power and duty of making the law directly to the people, or to a portion of them, thus relieving the representative body of its proper duties and responsibilities. But the power of legislating in this wise is granted in the constitution, and in the Constitution of the United States the power to regulate commerce is one of the express powers, and it is therefore subjected to no restriction save the inhibitions contained in the Constitution itself. There is no restriction placed upon its exercise in the Constitution, and it follows that the power to regulate commerce is plenary, and that all proper means for that purpose may be exercised by the Congress without restrictive inhibitions from the courts. This point is most aptly illustrated in the case of *McCullough* v. *Maryland* (4 Wheat., 315, 413), which arose over the words of the Constitution granting to the Congress power to pass all laws which are "necessary and proper" to carry into execution powers conferred by that instrument. It was contended in that case that these words carry with them the right only to pass such laws as were indispensably requisite or absolutely necessary for the accomplishment of the desired object, but the court held that if the object be within the scope of the Constitution all measures which are appropriate to that end may be employed to carry it into effect, and that the *degree* of its necessity is to be determined by the Congress alone, and that when the Congress has determined that degree the court can not review its decision.

The confusion which has existed in the courts between a *lack of power* and what some jurists have been pleased

to consider the unwise *exercise* of legislative *discretion* is so well stated by Chief Justice Pearson in *Manly* v. *The City of Raleigh* (4th Jones Eq. N. C., at p. 376) that we may be pardoned for again adverting to it. In reply to the objections that had been made to this method of legislation by the court of appeals of New York in the case of *Barto* v. *Himrod*, Chief Justice Pearson says:

> It seems to us the court in New York fell into error by not discriminating between a *want* of power and an *abuse* of power. All legislative power is vested in the general assembly, restricted only by the Constitution. There is no prohibition in the Constitution against this method of legislation, consequently, although it may be an abuse of power greatly to be deprecated as tending to subvert the principles of a representative form of government, still the power has been granted and it is not the province of once branch of the Government to correct the supposed abuses of another.

It is interesting to observe that these chimerical fears of the subversion of our representative form of government by too much democracy has not been shared by the people of the country, and during the past seventy-five years the people have gone on steadily absorbing more power of this character to themselves, and steadily taking from the legislatures that which had been hitherto deemed their special function. There is no denying that from year to year there has been a general and growing distrust for State legislatures, which has resulted in a very large curtailment of their authority, and which appears likely to result in a much further curtailment of such authority in the near future. With the extension of the Federal power on the one hand, which is giving the

States a more limited field for the exercise of what were formerly esteemed their prerogatives, and the tendency on the other to remove what authority is still preserved to the States from the custody of the legislatures and to entrust it to other agents, these bodies are coming to have a greatly diminished influence. Much of the authority hitherto exercised by legislatures has been absorbed by constitutional conventions, which frame codes limiting the session of the legislature to a short term, and minutely defining upon what subjects within this short term these bodies may and may not legislate. These codes or constitutions are not repealable or alterable by the legislatures, and the people themselves have absorbed additional authority. The constitutions are referred by the conventions which frame them to the popular vote; constitutional amendments, though proposed by the legislatures, are submitted to the people for their ratification or rejection. Laws applying to the whole State, and laws relating to various local districts of the State, on certain subjects, by force of obligatory constitutional provisions, or by custom, are submitted to the direct popular vote of the people. And, indeed, there is now existent a widely diversified demand for taking from the legislatures the really only important functions which they seem to retain, to wit, the election of two United States Senators. And thus we see that the people have answered these fears of democracy by prescribing more democracy.

One of the earliest examples of referring a law to the people to be affected by it, for their approval or disapproval, is furnished by the action of the Federal Congress. We refer to the act of July 9, 1846.

The land which had been ceded by the State of Virginia to the United States for the purpose of a seat of government in the district, afterwards called the District of Columbia, did not prove to be needed for that purpose by the Federal Government, and the Congress, by the above-recited act, submitted to the people of the county of Alexandria the question of retrocession, and, the popular assent being given, the county was reattached to the State of Virginia. (See 9 Stat. L., p. 35, and the proclamation of President Polk on p. 1000.) This statute has been much cited by the State courts as tending to show the constitutionality of lawmaking by vote of the people in the States, inasmuch as the method had been thus employed by the Federal Government. And so one of the earliest, if not the earliest, decisions which upheld the constitutionality of a law made to depend upon a future event, and directing that event to be made known by a person other than the legislature, is furnished by the decision of this court in 1812 in the case of *Cargo of the brig Aurora* v. *The United States* (7 Cranch., 382). This case grew out of the violation of the nonintercourse act passed by Congress during the period preceding the war of 1812. This was a law which was to be enforced against Great Britain and France until those countries should modify their policy toward the United States, when the President was authorized to raise the embargo by proclamation. It depended for its repeal upon a contingency, which contingency was to be declared by the President. This case has likewise been extensively cited by the State courts in support of the constitutionality of this character of legislation. And the case was cited

and quoted with approval by this court in 1891, in the case of *Field* v. *Clark* (143 U. S., at p. 691). In this case it was held that the authority conferred upon the President by the McKinley tariff bill of 1890 (26 Stat., 612), to suspend by proclamation the free introduction of sugar, molasses, etc., when he is satisfied that any country producing such articles imposes duties or other exactions upon the agricultural or other products of the United States which he may deem to be reciprocal, unequal, or unreasonable, is not open to the objection that it unconstitutionally transfers legislative power to the President. Mr. Justice Harlan, who was the organ of the majority of the court in that case, cited and quoted with approval a number of the cases from the State courts, which have already been referred to, as follows:

> The true distinction, as Judge Ramey, speaking for the supreme court of Ohio, has well said, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made. *Cincinnati, etc., Railroad* v. *Commissioners* (1 Ohio State, 88). In *Moers* v. *The City of Reading* (21 Pa. State, 188, 202) the language of the court was: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it can not be said that the exercise of such discretion is the making of the law." So in *Locke's Appeal* (72 Pa. State, 491–498): To assert that a law is less than a

law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare, whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know. The proper distinction, the court said, was this: "The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or set of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government." There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.

How pertinent is this language to the case at bar? If it is to be held that the Congress can not empower the Secretary of War to perform the duties intrusted to him by the acts under discussion, then the power to regulate commerce between the States, granted to the Congress by the Constitution, might as well be stricken out of the enumerated powers in that instrument, since it would be practically impossible for the Congress to regulate every matter of detail concerning the exercise of this vast and important duty. Such a decision, to use the language of the Pennsylvania supreme court, which was quoted with approval by this court in the extract just cited, would be to stop the wheels of government. It would be impossible for the Congress to be perpetually in session and to pass directly upon every question raised as to whether or not a given structure was an obstruction to navigation; to turn itself into a judicial tribunal to hear the evidence

pro and con upon these subjects and arguments of counsel, and to determine for itself in every instance whether a given structure should be required to be removed in order to prevent obstruction to commerce. Whatever fine-spun theories of argument may be made, the practical fact remains that it would be impossible for the Congress to do it. Because the Congress *may* do a thing, it by no means follows that it *must* do it. The Congress can only legislate in a general way, and large powers are necessarily entrusted to the different departments relating to matters of administration and execution, and the field of this discretionary power is so vast and important, and the interests of modern life so intricate, that the doctrine of *delegatus non potest delegare* as applied restrictively to the exercise of legislative discretion of this character has no practical existence at the present time. In this court no instance can be found in which a statute has been declared to be unconstitutional because it delegated to another legislative or judicial functions, although there has been, perhaps, more litigation along this line in this court than in all the State courts combined—not, perhaps, in number, but in the variety of the statutes which have been attacked upon this ground. In the act which is now being attacked we have a law whereby the Congress has passed a complete act providing that it shall be a misdemeanor to maintain an unreasonable obstruction to navigation, after a notice and hearing, and after the special tribunal charged with the investigation and finding of the facts has determined that there is an unreasonable obstruction, and a reasonable time for removing the obstruction has expired. The party concerned has a hearing and

the offense is not complete until after the hearing and a determination against him, and an opportunity to abate the obstruction has been given. The whole inquiry resolves itself into this: Must the Congress itself consider every case of alleged obstruction to navigation and determine the facts and declare that an obstruction exists, or can it generally define the offense and leave the facts to be determined by a special agent delegated for that purpose? There can be but one answer to this question if we are to have any regard for the practical enforcement of the duty imposed upon the Congress by the Constitution to regulate commerce. And whether this question be reached by a refinement upon the facts holding that the Congress has not, in fact, delegated any power which it itself ought to perform, or whether the decision be put upon a denial of this limitation as applied to an expressly enumerated power in the Constitution, when that instrument itself contains no inhibitions upon it, is immaterial. If it be conceded that the Congress can not delegate to other agencies any form of legislative power, still in this case there has been no such delegation and no attempt at such a delegation. In either aspect of the case the judgment of the court below should be affirmed.

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